APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 16, 1992
Decided October 8, 1993

No. 91-5315

BRETT C. KIMBERLIN,
Appellee,

v.

MICHAEL J. QUINLAN, *et al.*,
Appellants.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 90-01549)

Robert M. Loeb, Attorney, U.S. Dept. of Justice, Assistant United States Attorney, argued the cause for the appellants. On brief were *Jay B. Stephens*, United States Attorney at the time the briefs were filed, *Stuart M. Gerson*, Assistant Attorney General, and *Barbara L. Herwig*, Assistant United States Attorney.

Howard T. Rosenblatt argued the cause for the appellee.

Jane E. Kirtley filed the brief for amicus curiae Reporters Committee for Freedom of the Press.

David H. Remes and *Arthur B. Spitzer* filed the brief for amicus curiae American Civil Liberties Union of the National Capital Area.

Before EDWARDS, WILLIAMS and HENDERSON, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* HENDERSON.

Separate concurring opinion filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Circuit Judge* EDWARDS.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Brett C. Kimberlin, a federal prisoner, brought this action against J. Michael Quinlan, Director of the Bureau of Prisons (Bureau), Loye W. Miller, Jr., Director of Public Affairs at the Department of Justice (Department), and the United States. The complaint alleged Quinlan and Miller, in their individual capacities, conspired to violate and in fact violated Kimberlin's rights under the first and fifth amendments to the United States Constitution by denying him, respectively, access to the press and due process of law. In addition, the complaint charged the United States and Quinlan in his official capacity with the torts of assault and battery and with violating title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511. The district court dismissed the tort claims in part[1] and the fifth amendment claims *in toto* but left intact the first amendment and title III claims. *See Kimberlin v. Quinlan*, 774 F. Supp. 1 (D.D.C. 1991). Quinlan and Miller now appeal the district court's denial of their motions for dismissal or summary judgment on the first amendment claims, alleging they are entitled to qualified immunity from liability on those

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1 Kimberlin alleged claims of assault, battery and false imprisonment. The district court dismissed the first two, but not the third, for improper venue.

claims.[2] For the following reasons we conclude the appellants are entitled to qualified immunity and, accordingly, reverse the district court's decision and remand with direction to enter summary judgment in their favor on the first amendment claims.

The circumstances giving rise to Kimberlin's claims are largely undisputed. Sometime before the November 8, 1988 presidential election, while incarcerated at the El Reno Federal Correctional Institution (El Reno) in El Reno, Oklahoma,[3] Kimberlin announced to members of the news media that he had sold marijuana to Dan Quayle, the Republican candidate for Vice President, when Quayle was a law student in the early 1970s. On November 3, the Thursday before the election, NBC News contacted El Reno authorities and requested an interview with Kimberlin. The Bureau's Central Office in Washington, under pressure from NBC News, directed that the interview be expedited in order to occur before the election. Accordingly, the interview was conducted on Friday November 4.[4] On either Thursday or Friday, an official at the Bush/Quayle Campaign, having learned of the situation from other sources, telephoned the Bureau "for additional information" and was informed of the interview. Memorandum from Quinlan to Francis A. Keating, II, Associate Attorney General (Keating Memorandum) at 4.[5]

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2 Denial of a summary judgment motion based on qualified immunity is immediately reviewable by interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985).

3 Kimberlin is serving a fifty-one year sentence for drug- and explosives-related charges.

4 NBC News ultimately declined to broadcast the story.

5 The exact date of the call is unclear as Quinlan placed it on "Friday, November 3rd," misidentifying either the day of the week or the date. Keating Memorandum at 4.

Other interview requests followed and, according to Carolyn A. Sabol, Regional Counsel for the Bureau's South Central Regional Office, "the Acting Warden suggested that a joint interview be set up to reduce the strain on institution resources of handling each interview separately." June 19, 1990 Letter from Sabol to Howard T. Rosenblatt, Counsel for Brett C. Kimberlin (Sabol Letter). Accordingly, R.C. Benefiel, executive assistant to the El Reno warden, told Kimberlin that "he would set up a 'press conference' for that evening at 7:00." Oct. 30, 1990 Declaration of Brett C. Kimberlin (Kimberlin Declaration) at 2. Mark Goodin, Deputy Press Secretary for the Bush/Quayle campaign, learned of the impending press conference from a reporter and telephoned Miller to say he was "amazed" that Kimberlin was to hold a press conference. Oct. 16, 1990 Deposition of Mark W. Goodin 73. Miller responded "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." *Id.*

Late in the afternoon of November 4, Quinlan ordered the press conference cancelled because, as he put it, "[t]he Bureau's policy on media access permits individual media contacts by inmates, as well as small press pools under specialized circumstances, but does not authorize inmate press conferences." Keating Memorandum at 3. Quinlan apparently maintained a consistent policy against press conferences by prisoners. *See* Aaron Freiwald, *Isolation for Inmate with Quayle Claims*, Legal Times, Dec. 19, 1988, at 10 ("Quinlan . . . notes that he has not allowed a prison press conference since he became director of the bureau late last year.").[6]

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6 The Bureau's regulations set out procedures for personal interviews, 28 C.F.R. § 540.63 (1988), and press pools in which one representative from each news medium participates, 28 C.F.R. § 540.64 (1988), but make no mention of press conferences. While Kimberlin does not challenge the regulations' validity, he does assert that because they do not prohibit press conferences he was entitled to hold one. The logic of Kimberlin's sub silentio argument eludes us. That which the regulations authorize is authorized; conversely what they do not authorize is not authorized. Further, the regulations provide that "[a]ny questions as to the meaning

At approximately 11:30 p.m. on November 4 Kimberlin was placed in administrative detention at Quinlan's direction. Sabol Letter at 3. The administrative detention order entered by the El Reno prison officials on November 4 recited as the reason for detention that Kimberlin "stated to the National news media this [sic] his life is in danger." November 4, 1988 Detention Order. A contemporaneous memorandum from Benefiel to Kimberlin's file stated that J.D. Williams, the Bureau's South Central Regional Director, had telephoned to report that a radio reporter had informed Miller that Kimberlin "feared retaliation and had fear for his safeth [sic]." November 4, 1988 Memorandum from R.C. Benefiel to Investigative File. The memorandum further noted that "the evening watch lieutenant . . . had been receiving information that inmates on the compound were saying that if Kimberlin will snitch on Quale [sic] he will do the same to us." *Id.* Benefiel's memorandum concluded: "Based upon the information about his being called a snitch and the telephone call from Mr. Williams it was decided that to insure the inmates [sic] safety he would be placed in administration detention until the matter could be throughly [sic] investigated by investigative staff. I directed the evening watch to make such placement." *Id.*

The following day, while Kimberlin was still in detention, Miller received another telephone call from Goodin who "noted the obvious: that the closer to the Tuesday election that the story were to break, the more attention it was likely to get, and the better the chance that it could have at least some adverse effect on the Bush-Quayle

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or application of this subpart are resolved by the Director of the Bureau of Prisons." 28 C.F.R. § 540.61(g). Quinlan has, as noted, apparently consistently exercised his discretion under this provision to prohibit prisoner press conferences and to limit inmates' press access to the more manageable settings expressly authorized under the regulations. To the extent that this policy may impinge on a prisoner's first amendment rights, it is nevertheless valid as "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

chances." October 11, 1989 Memorandum from Miller to Whom it May Concern (Miller Memorandum) at 4. Miller noted, however, that "Goodwin [sic] did not try in any way to influence the department's handling of Kimberlin." *Id.* Goodin himself denied seeking or receiving any "reassurances" from Miller, Goodin Deposition at 73, or ever speaking with anyone at the Bureau, *id.* at 90. In addition, Quinlan stated the Bureau received only a single call from the Bush/Quayle campaign regarding Kimberlin, the one described above, and that "[a]t no time during the entire period from Thursday, November 3rd through Election Day did anyone from the Bush/Quayle campaign ask or instruct the Bureau of Prisons to do anything with regard to this matter." Keating Memorandum at 4. Around 7:30 that evening, Kimberlin was released from detention after an investigation revealed no threat to his safety and "Kimberlin specifically stated he did not perceive a threat." Sabol Letter at 3.

On November 7, Kimberlin was again placed in administrative detention, this time, according to the Bureau, for violating a Bureau regulation prohibiting any prisoner from making a third-party telephone call, that is, a call placed to one party who electronically transfers it to another party. November 7, 1988 Incident Report; *see* 28 C.F.R. § 540.104 (1988) ("Third party billing and electronic transfer of a call to a third party are not permitted."). According to El Reno records, the third-party call occurred on November 4 when Kimberlin telephoned a friend who in turn connected him through a conference call to a lawyer for the Democratic National Committee. Nov. 14, 1988 Disciplinary Hearing Officer Report 2. The same records noted that Kimberlin admitted making the call but denied knowing it was proscribed. *Id.* He was found guilty of the violation after a hearing on November 14 and was released later that day. *Id.*

Kimberlin was placed in detention for a third time on December 22, according to the Bureau, for again violating

the third-party telephone prohibition. Local prison officials released Kimberlin on December 23 and found him not guilty because there was "no specific evidence that [Kimberlin] intentionally placed a conference/third-party call." January 9, 1989 Incident Report. This detention occurred a few days after news stories appeared describing Kimberlin's problems with prison officials and one day after Kimberlin had conducted two telephone interviews. Kimberlin Declaration at 4.

As previously noted, the foregoing facts are not in dispute. What is vigorously contested is the motivation for Kimberlin's three detentions. Kimberlin alleges the first two detentions were ordered to deny him access to the press while the third was in retaliation for his media interviews. The appellants, on the other hand, maintain that the detentions were ordered for the reasons set out above: the first to ensure Kimberlin's safety and the later two on account of the third-party call infractions. Specifically, they claim they are entitled to qualified immunity from suit because their actions were objectively reasonable under the facts as established in the record. We agree.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court established an objective test for qualified immunity under which "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 815-16. Since then the Court has made it clear that qualified immunity should be granted, and suit dismissed, where the plaintiff "not only failed to allege the violation of a constitutional right that was clearly established at the time of the [defendant's] action, but . . . failed to establish the violation of any constitutional right at all." *Siegert v. Gilley*, 111 S. Ct. 1789, 1794 (1991). The Court has emphasized that qualified immunity is "an *immunity from suit* rather than a

mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and that "[o]ne of [its purposes] is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991). Thus, it "ordinarily should be decided by the court long before trial," *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991), "at the earliest possible stage in litigation," *id.* at 536, and "such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Mitchell v. Forsyth*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 817).

Because of the special immunity accorded government officials who act in an objectively reasonable manner, this court has established a "heightened pleading" standard for a plaintiff like Kimberlin who sues government officials and alleges unconstitutional motive. Ordinarily, "[u]nder Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'" so that entry of summary judgment is "mandated" "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56).[7] We impose a more stringent standard,

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[7] As noted above, Miller's and Quinlan's motion was one for, alternatively, dismissal or summary judgment. Because the parties submitted and the district court considered materials outside the pleadings, we treat the motion as one for summary judgment. *See* Fed. R. Civ. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . .").

however, on a plaintiff who charges a government official with a constitutional deprivation where the outcome depends on the official's state of mind. Such a plaintiff is subject to this circuit's so-called "heightened pleading" standard, requiring pleading of specific *direct* evidence of intent to defeat a motion to dismiss and subsequent production of such evidence to defeat a motion for summary judgment.[8] *See Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Smith v. Nixon*, 807 F.2d 197 (D.C. Cir. 1986); *Martin v. District of Columbia Metro. Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987); *Martin v. Malhoyt*, 830 F.2d 237 (D.C. Cir. 1987); *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989); *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991).[9] While refraining from adopting the direct/circumstantial distinction we employ, most other circuits have adopted some sort of "heightened pleading"

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[8] When applied, as here, at the summary judgment stage, the expression "heightened pleading" is a misnomer because the enhanced standard requires a greater evidentiary showing rather than enhanced pleading. *See Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) ("[W]e deprecate the expression 'heightened pleading' and speak instead of the minimum quantum of proof required to defeat the initial motion for summary judgment."). For summary judgment, the applicable standard might better be characterized as one of "heightened production."

[9] Recently, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), the Supreme Court rejected a heightened pleading standard in section 1983 suits alleging *municipal* liability but expressly noted it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 1162. The Court observed that "unlike various government officials, municipalities do not enjoy immunity from suit -- either absolute or qualified," *id.*, suggesting the result might be different in individual capacity actions against government officials. The Court also noted that a true heightened pleading standard, applied to a motion to dismiss based solely on the pleadings, "is impossible to square with the liberal system of 'notice pleading' set up by the Federal Rules" and particularly with rule 8(a)(2)'s requirement that "'a complaint include only a short and plain statement that the pleader is entitled to relief,'" *id.* at 1163, a consideration that does not apply to a heightened standard of production at the summary judgment stage. *See supra* note 5. In any event, because the Court did not address heightened pleading in individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit.

standard to further the goal of qualified immunity, namely to protect government officials from the burdens of litigating "insubstantial claims," *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 817-18.[10]

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[10] *See, e.g., Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763-64 (4th Cir. 1990) ("We agree with the *Martin [v. Malhoyt]* court that a 'heightened pleading standard' is highly appropriate in actions against government officials."); *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir. 1992) ("[T]his circuit requires that § 1983 plaintiffs meet heightened pleading requirements in cases, such as this, in which an immunity defense can be raised."); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986) ("It is not enough for a complaint under § 1983 to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings."); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991) ("[W]e think that the best solution to the conundrum is to require the plaintiff to produce 'specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal.' Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery." (quoting *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring)); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989) ("Damage actions against government officials are subject to a heightened standard of pleading with sufficient precision '"to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds."' *Martin v. Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987) (quoting *Hobson v. Wilson*, 237 U.S. App. D.C. 219, 737 F.2d 1, 29 (1984))."); *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991) ("We believe a requirement that a plaintiff must put forward nonconclusory allegations of subjective motivation, supported either by direct or circumstantial evidence, before discovery may be had, satisfies *Harlow*'s directive that government officials should be shielded from 'insubstantial', lawsuits, while at the same time preserving the opportunity for plaintiffs to pursue meritorious claims."); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649-50 (10th Cir. 1988) ("We agree with the *Martin [v. District of Columbia Metro. Police Dep't]* court that '[t]he Supreme Court's "strong condemnation of insubstantial suits against government officials" impels the application of a standard more demanding of plaintiffs when public officer defendants move for summary judgment on the basis of their qualified immunity.' [*Martin*, 812 F.2d at 1435] (quoting *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984)). Where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated. In some instances only the pleadings are examined, see *Hobson*, 737 F.2d 1, 29-30 (D.C. Cir. 1984) (heightened pleading standard required to proceed to discovery), while in others, such as the present case, the information that is developed by discovery before the motion is made should also be considered, *DeVargas [v. Mason & Hanger-Silas Mason Co.]*, 844 F.2d [714,] 719 (10th Cir. 1988)."); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) ("On a related

In *Whitacre*, we explained the rationale for our heightened pleading standard as follows:

> Since "substantial costs attend the litigation of the subjective good faith of government officials," *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737, and since the Court stressed the need to terminate insubstantial *Bivens*[11] claims before trial, *see id.* at 815-16, 102 S. Ct. at 2736-37, we have supplanted the liberal pleading requirements of the Federal Rules with a heightened pleading standard whenever a plaintiff in a *Bivens* claim alleges an unconstitutional motive.

890 F.2d at 1171 (citing *Malhoyt*, *Smith* and *Hobson*). More recently, in *Siegert*, we clearly explained how the standard applies to a summary judgment motion based on qualified immunity:

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial,

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question about pleadings (whether the complaint states a claim), we want to use this opportunity to repeat that, 'in an effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims we, and other courts, have tightened the application of Rule 8 to § 1983 cases.' *Arnold v. Board of Educ. of Escambia County*, 880 F.2d 305, 309 (11th Cir. 1989) (citation omitted). In pleading a section 1983 action, some factual detail is necessary, especially if we are to be able to see that the allegedly violated right was clearly established when the allegedly wrongful acts occurred."). The Fourth Circuit recently observed: "Whether the purposes of *Harlow* in discriminatory animus cases are expressed by means of qualified immunity formulation or by a requirement of heightened pleading is not critical. In either case, courts have sought to achieve the same purpose, namely the effectuation of the aims of qualified immunity in claims which incorporate a subjective element." *Gooden v. Howard County*, 954 F.2d 960, 970 n.3 (4th Cir. 1992) (en banc).

11 In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court authorized damages actions against federal officials for constitutional torts.

> must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

895 F.2d at 801-02 (citing *Martin*, 812 F.2d at 1435); *see also Whitacre*, 890 F.2d at 1171 ("[W]e have imposed, in cases where the defendant's subjective intent is an essential part of the claim, a demanding requirement on the plaintiff in order to proceed to trial or obtain discovery. *See Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1435 (D.C. Cir. 1987). '[T]o avert dismissal short of trial, [the plaintiff] must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some *direct evidence* that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.' *Id.* (emphasis added)."). Thus, in response to Miller's and Quinlan's motions below, Kimberlin was required to proffer *direct* evidence of unconstitutional motive on the part of the two defendants and was precluded from relying on mere circumstantial

evidence. We conclude Kimberlin failed to sustain this burden.[12]

To establish unconstitutional motive for his first detention, Kimberlin relied primarily on alleged discrepancies among the various participants' accounts of the circumstances preceding the detention. On November 4, the date of Kimberlin's first detention, Miller spoke over the telephone at least twice with the radio reporter who, according to Miller, related that Kimberlin had told her the cancellation of the press conference "led him to believe his safety was threatened by the hostile attitude of the prison authorities." Miller Memorandum 2-3. Quinlan, consistently, maintained he placed Kimberlin in detention after, and because, he learned that the reporter had "advised Loye Miller . . . that she believed Kimberlin might be in some 'danger.'" Keating Memorandum at 3. The reporter, on the other hand, while admitting that an hour before his detention Kimberlin told her he "was concerned about what the Justice Department might do to him," denied having "quoted Kimberlin as saying his life was in danger." November 9, 1990 Declaration of Radio Reporter at 2. Kimberlin himself denied ever having "perceived" or "expressed" "fears that other inmates would harm [him]."

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12 We recognize that in one recent section 1983 case alleging unconstitutional intent a panel of this court characterized the "heightened pleading" standard simply as requiring "nonconclusory allegations" that are "sufficiently precise" and "specific and concrete enough" to put the defendants on notice of the nature of the claim and enable them to prepare a response, including a summary judgment motion based on qualified immunity grounds, without any mention of either direct or circumstantial evidence. *Crawford-El v. Britton*, 951 F.2d 1314, 1317, 1320 (D.C. Cir. 1991). The reason for this omission appears to lie in the defendant-appellant's failure to raise the distinction in her discussion of the heightened pleading standard. *See* Brief for Appellant at 12-14, *Crawford-El*. Even so, in finding the plaintiff had met the standard, the *Crawford-El* panel expressly relied on "specific statements" by the defendant that showed her intent. *Id.* at 1321. In any event, the panel decision in *Crawford-El* did not, and could not, overrule the then established circuit requirement that a plaintiff plead or produce, depending on the stage of litigation, direct evidence of unconstitutional intent.

Kimberlin Declaration at 3.[13] Assuming, as we must on this motion, that the reporter's recollection of her conversations is correct and that she did not relay Kimberlin's fear of the Department to Miller, her account merely disputes Miller's description of their conversations, without contradicting the affirmative evidence that Quinlan ordered the detention because of information regarding Kimberlin's safety, whether or not accurately conveyed, that he received from Miller.[14] More importantly, none of the evidence Kimberlin cites does more than cast doubt on the appellants' stated reasons for their actions -- it does not constitute direct evidence that they acted out of any impermissible motive, as our circuit's heightened standard requires. *Cf. St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993) (title vii plaintiff does not carry burden of persuasion merely by disproving proffered explanation for firing but must affirmatively establish race as actual motivating factor).

In fact, the motive Kimberlin alleges -- denying him access to the press -- seems particularly unlikely since Kimberlin had already aired his allegations to NBC News and was permitted telephone contact with members of the media and others, even during his detention. *See* Deposition of Richard D. Acuff, Exh. 4 (handwritten notes by prison staff documenting seven calls made by Kimberlin on

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[13] In support of his claim, Kimberlin also cites a statement by Miller that he was "pretty sure" that Kimberlin was already in detention before he spoke with the Bureau. Miller Memorandum at 4. This equivocal statement is inconsistent, however, with Miller's recollection that he telephoned the Bureau at "perhaps 11 p.m." *Id.* at 2, which would have been 10:00 p.m. in El Reno, Oklahoma, a full hour and a half before Kimberlin was placed in detention.

[14] Given this evidence, Quinlan acted in an objectively reasonable manner in ordering Kimberlin's detention until his safety could be assured. Prison officials have an obligation to provide prisoners with reasonable protection from foreseeable violence. *See, e.g., Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986). Thus, given the information he received from Miller, Quinlan would have been remiss, and risked liability, had he failed to order detention and Kimberlin subsequently came to harm. Of course, by ordering the detention Quinlan also risked (and got) a lawsuit.

November 5 during his detention); November 7, 1988 Memorandum of T.C. Martin to J. Michael Quinlan (referring to "[s]even cassette tapes" containing "copies of the telephone conversation by Brett Kimberlin with numerous news media personnel, family and friends"); Sabol Letter at 3 ("Kimberlin spoke to the radio reporter "again on Saturday, November 4, 1988, while he was still in detention"). Further, the timing and tenor of Miller's conversations with the Bush/Quayle campaign belie any influence from that source. Because there is no direct evidence that Miller attempted to secure Kimberlin's detention or that Quinlan did so for any reason other than Kimberlin's safety, we conclude the district court erred in denying summary judgment as it related to Kimberlin's first detention.

Kimberlin's second allegation, that the November 7 detention was also ordered to deny him access to the press, fares no better. First, Kimberlin has cited no direct evidence that either Quinlan or Miller was even involved in this detention which appears to have been ordered by local prison officials. *See* Sabol Letter at 4 ("[T]his placement in administrative detention and the one in December, 1988, were both done at the local level and did not involve any direction or consultation with staff members of the Bureau of Prisons or the Department of Justice in Washington."); Keating Memorandum at 4 ("[T]he local officials decided to place Kimberlin in detention on Monday morning. The Central Office was not involved in that decision.").[15] In

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[15] Kimberlin cites two newspaper articles as evidence to support Quinlan's involvement in the November 7 detention: one in the *New York Times* quoting Miller as saying "Mr. Kimberlin was twice placed in administrative detention on the order of J. Michael Quinlan, head of the Federal Bureau of Prisons," *Solitary for Quayle's Accuser*, N.Y. Times, Dec. 20, 1988, at B9, and a second in the *Legal Times* similarly quoting Miller as asserting that "[t]he Bureau of Prisons caught on that he was going to hold another press conference so they put him back in," Aaron Freiwald, *Isolation for Inmate with Quayle Claims*, Legal Times, Dec. 19, 1988, at 10. Such hearsay, however, cannot defeat a summary judgment motion. While it is not necessary that "the nonmoving party must produce evidence in a form that would be admissible at trial in order to

addition, as already noted, it is beyond dispute that Kimberlin violated the published third-party call regulation -- the reason the Bureau proffered for his second detention both contemporaneously, *see* November 7, 1988 Incident Report; November 14, 1988 Disciplinary Hearing Officer Report, and subsequently, *see* Keating Memorandum 96; Sabol Letter at 68–69. Kimberlin has come forth with no direct evidence of any other motive for this detention.[16]

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avoid summary judgment," *Celotex*, 477 U.S. at 325, "normally" hearsay "would not be enough to raise an issue of fact for summary judgment purposes," *Crawford-El v. Britton*, 951 F.2d 1314, 1320 (D.C. Cir. 1991). Specifically, "A third party's description of [a witness's] supposed testimony is not suitable grist for the summary judgment mill." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990). Thus, the two newspapers' characterizations of Miller's statements are useless to Kimberlin. Further, as there is no evidence that Miller was involved in or had special information about the November 7 detention, his opinion regarding who ordered it or why cannot be viewed as direct evidence so as to satisfy our heightened standard.

16 In her June 19, 1990 letter, Sabol wrote:

> On Monday, November 7, 1988, upon review of intelligence information, it was determined that Mr. Kimberlin was attempting to use the telephone to set up a press conference in Washington D.C. that morning. As a result, Mr. Kimberlin was again placed in administrative detention, to avoid a violation of our rules and protect the integrity of institution security.

Id. at 3-4. There is nothing to suggest, however, that her explanation was based on information obtained from those involved (local officials) or even purportedly involved (Kimberlin and Miller) in the detention decision so as to constitute direct evidence of their intent.

Kimberlin also cites as evidence of improper intent that he was placed in detention before being found guilty of violating the third-party call regulation. *See* 28 C.F.R. § 541.22 (authorizing an inmate to be placed in administrative detention only (1) "when the inmate is in holdover status (i.e., en route to a designated institution) during transfer, or is a new commitment pending classification" or (2) "when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution" and one of six enumerated conditions is also present). This evidence, however, even if probative of intent, is wholly circumstantial and would therefore be insufficient to satisfy our heightened standard.

Finally, the appellants are entitled to qualified immunity on Kimberlin's claim that the December 22 detention was retaliatory because the record is also devoid of any direct evidence that either appellant was involved in that detention which, according to El Reno records, was imposed by local officials for a second alleged violation of the third-party call regulation.

In sum, Kimberlin relies only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by Quinlan and Miller; he has produced no direct evidence of unconstitutional motive for any of his detentions as required under our heightened standard. Such unsubstantiated claims as Kimberlin raises are precisely the sort that both qualified immunity and our circuit's heightened standard are intended to cut short. Accordingly, the district court's denial of the individual defendants' motion to dismiss or for summary judgment on the first amendment claims is

Reversed and remanded.

WILLIAMS, *Circuit Judge*: I concur in the opinion of the court. When a plaintiff claims that an official enjoying qualified immunity has committed a constitutional tort involving motive, circuit precedent requires the plaintiff to proffer "direct" (as opposed to circumstantial) evidence of the illicit motive before obtaining discovery against the official. See Maj. Op. at 8-12; *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), aff'd on other grounds, 111 S. Ct. 1789 (1991); *Whitacre v. Davey*, 890 F.2d 1168, 1171 & n. 4 (D.C. Cir. 1989). Plaintiffs here have not met that standard. Maj. Op. at 13-17.

This is not to say that circuit law is correct. The restriction arose out of an effort to reconcile conflicting goals: to protect officials with qualified immunity from undue litigation burdens and to afford legal remedies for citizens whose rights may have been abused. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), had framed the qualified

immunity test in objective terms precisely because a rule that sheltered an official only *after* he had incurred the burdens of discovery into his motivation -- a highly subjective issue -- would be pretty flimsy shelter. *Id.* at 814-19; see also *Elliott v. Thomas*, 937 F.2d 338, 344 (7th Cir. 1991). In adopting the "direct" evidence rule for constitutional torts involving motive, we reasoned that *Harlow* logically required an especially high threshold showing of unconstitutional motive before defendant should be exposed to discovery. *Whitacre*, 890 F.2d at 1171.

The distinction between direct and circumstantial evidence, however, appears completely arbitrary and unrelated to the strength of the plaintiff's case. As Judge Easterbrook pointed out in *Elliott*, the requirement would be fatal except in the rare case of the defendant's confession. 937 F.2d at 345. At the same time, while a perjured claim of having heard such a confession would meet the test, a massive circumstantial case would not. And, speaking for the Ninth Circuit, Judge Hall noted that evidence of the defendant's intent was likely to be peculiarly under his control. *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991). It is hardly surprising that the only circuits to consider our direct evidence rule have rejected it. *Elliott; Branch*. Both circuits concluded that it was enough for plaintiff to put forward specific, non-conclusory allegations, *Elliott*, 937 F.2d at 344-45; *Branch*, 937 F.2d at 1387, which we require even in cases having nothing to do with motive, see *Andrews v. Wilkins*, 934 F.2d 1267, 1269-70 (D.C. Cir. 1991); *Hunter v. District of Columbia*, 943 F.2d 69, 76-77 (D.C. Cir. 1991).

The simple requirement of specific, non-conclusory allegations may not be the only reasonable alternative to *Siegert*. Doubtless recognizing the vulnerability of the direct evidence rule, the Justice Department here argued a fallback position. A plaintiff could get to discovery only by making a showing of illicit intent so strong that, if the specific facts alleged were accepted as true, any reasonable jury would have to infer illicit motive. (Discovery and ultimately trial would of course be necessary to determine whether the

specific allegations were true.) Appellant's Brief at 30-32. The proposal bears some resemblance to a test devised for cases where plaintiff claimed that officials with qualified immunity had conducted electronic surveillance, with lawfulness turning on whether they had done so for national security purposes. *Halperin v. Kissinger*, 807 F.2d 180, 184-85 (D.C. Cir. 1986). There we said defendants' summary judgment motion should be granted if they "adduce[d] sufficient facts that no reasonable jury, looking at the evidence in the light most favorable to . . . plaintiffs, could conclude that it was objectively unreasonable for the defendants to be acting for national security reasons". *Id.* at 189; see also *id.* at 188 (immunity defense prevails "if the facts establish that the purported national security motivation would have been reasonable"). The rule proposed by the appellants seems more stringent than the one we adopted for a situation that combined inquiry into motive with national security concerns, so it may be logically unsustainable. If the direct evidence rule is reexamined *en banc*, however, the reconsideration should encompass alternatives.

EDWARDS, *Circuit Judge*, dissenting: Brett Kimberlin, a federal inmate, claims in this case that the Director of the Bureau of Prisons and the Director of Public Affairs at the Department of Justice violated his First Amendment rights when they caused him to be placed in "administrative detention" to retaliate against him for trying to talk with the media. According to Kimberlin, this retaliation occurred in conjunction with the federal officials' attempts to prevent him from telling his story that he allegedly sold marijuana to former Vice President Quayle when Quayle was in law school. The majority now holds that, under a so-called "heightened pleading" standard, Kimberlin's lawsuit must be dismissed because his complaint rests on "circumstantial evidence." In my view, this result is misguided and unfair; it also stands at odds with the Supreme Court's most recent pronouncements on "heightened pleading."

On March 3, 1993, the Supreme Court held that a federal court may not apply a "'heightened pleading standard' -- more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure -- in civil rights cases alleging municipal liability under [42 U.S.C. § 1983 (1988)]." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1161 (1993). In reaching this conclusion, the Court wrote that "it is *impossible* to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 1163 (emphasis added). The Court also made it clear that a heightened pleading requirement "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* Although the Supreme Court did not address the immunity issues present in this case, *id.* at 1162, the rationale underlying the decision in *Leatherman* -- that standards of "heightened pleading" are *fundamentally incompatible* with FED. R. CIV. P. 8(a) -- casts doubt on the validity of *any* judge-made "heightened pleading" standard imposed in *any* context. *See id.* at 1163.

Despite the strong message sent by the Supreme Court in *Leatherman*, the majority in the instant case embraces a heightened pleading standard without giving serious attention to its validity or wisdom. To make matters worse, the majority adds an insupportable gloss to the standard, distinguishing between direct and circumstantial evidence, thereby requiring *Bivens*[17] plaintiffs to plead direct, as opposed to circumstantial, evidence of unconstitutional motive, or suffer immediate dismissal of their suits. Ours is the only circuit that imposes such a requirement on civil rights plaintiffs.[18] I dissent because,

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17 *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

18 Three circuits have considered and explicitly rejected a heightened pleading standard that requires the plaintiff to plead direct, as opposed to circumstantial, evidence of unconstitutional intent. *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991); *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973, *and cert. denied*, 112 S. Ct. 1242 (1992); *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989).

even assuming that a heightened pleading standard can be valid, the majority's so-called "direct evidence rule" has no foundation in reason or in the case law.

I. BACKGROUND

The infirmity and unfairness of the so-called "direct evidence rule" is starkly apparent in this case, in which a *Bivens* plaintiff has provided ample -- albeit circumstantial -- evidence that government officials twice violated his First Amendment rights. Brett Kimberlin, a federal inmate, alleges that J. Michael Quinlan, the Director of the Bureau of Prisons ("BOP"), and Loye W. Miller, Jr., the Director of Public Affairs at the Department of Justice ("DOJ"), violated his First Amendment rights when they caused Kimberlin to be placed in "administrative detention" to silence him and to retaliate against him for trying to tell his Quayle story to the media.[19] Although Kimberlin has not had the benefit of discovery, he has submitted to the court numerous affidavits, prison documents, newspaper articles, and memoranda written by the defendants that provide strong circumstantial evidence in support of his allegations.

The events in this case took place shortly before and after the 1988 presidential election, during which time Kimberlin was incarcerated at the federal prison in El Reno, Oklahoma. About two weeks before the election, Nina Totenberg, a journalist, received a tip that Kimberlin had sold marijuana to vice-presidential candidate Quayle when Quayle was in law school. Totenberg interviewed Kimberlin by telephone, and arranged for Kimberlin to give an affidavit verifying his story. Declaration of Nina Totenberg, *reprinted in* Joint Appendix ("J.A.") at 79, 79. Thereafter, Totenberg sent the Kimberlin affidavit to Mark Goodin, the

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[19] Kimberlin also alleges that the defendants caused him to suffer continual harassment for exercising his First Amendment rights when he was placed in administrative detention on December 22, 1988, after talking to reporters about his Quayle story. However, Kimberlin has not corroborated this allegation with specific facts linking the defendants to the December 22 detention; therefore, I agree that it does not survive a heightened pleading standard.

deputy press secretary of the Bush-Quayle campaign; Goodin, in turn, then showed the affidavit to James Baker, the Bush-Quayle campaign chairman, Lee Atwater, the Bush-Quayle campaign manager, and Stuart Spencer, the Quayle campaign manager. Deposition of Mark Wayne Goodin, *reprinted in* J.A. at 97, 99-103.

At about this time, other news organizations became interested in Kimberlin's story and began requesting interviews. Prison officials in El Reno agreed to allow NBC to interview Kimberlin on November 8, 1988, election day. Not satisfied, NBC threatened to broadcast Kimberlin's allegations and run a "cover-up" story unless an earlier interview could be arranged. On Thursday, November 3, the Central Office of the BOP in Washington, D.C. asked the prison officials in El Reno to arrange for an earlier interview. Director Quinlan later wrote in a memorandum that "Kimberlin's fundamental lack of credibility, and the likelihood of unnecessarily precipitating a 'cover-up' story just before the election, were major factors in the decision to permit the original NBC interview on an earlier schedule." Memorandum from J. Michael Quinlan to Francis A. Keating, II (Dec. 22, 1988), *reprinted in* J.A. at 93, 94.

NBC interviewed Kimberlin at the prison from 11:30 a.m. until 12:15 p.m. on Friday, November 4. Memorandum from R.C. Benefiel to Investigative File (Nov. 4, 1988), *reprinted in* J.A. at 49. Meanwhile, because prison officials had received so many requests for interviews with Kimberlin, Roger Benefiel, the Acting Warden in El Reno, suggested that a "joint interview" or "press conference" be held. Kimberlin agreed to the press conference, which was scheduled for 7:00 p.m. that evening. Administrative Tort Claim #89-324, Letter from Carolyn A. Sabol to Howard T. Rosenblatt (June 19, 1990), *reprinted in* J.A. at 66, 67; Declaration of Brett C. Kimberlin, *reprinted in* J.A. at 72, 72-73. Director Quinlan cancelled the press conference. Quintlan/Keating Memorandum, *supra*, J.A. 95, Reporters who arrived at the prison for the press conference were told that it had been cancelled due to "unfor[e]seen

circumstances." Press Release (Nov. 4, 1988), *reprinted in* J.A. at 37.

Later that night, Director Quinlan ordered Kimberlin into "administrative detention," which, according to BOP regulations, confines the inmate in a special cell and removes him from the general prison population. 28 C.F.R. § 541.22 (1992). At 10:30 p.m. on November 4, Kimberlin was handcuffed, wheelbarrow-marched across the outdoor compound without a coat, strip searched, and locked into a small cell. Kimberlin Declaration, *supra*, J.A. 73. He was expressly forbidden to make phone calls until the next afternoon, when a duty officer demanded that he call Totenberg. *Id.* at 74; FCI El Reno Special Housing Unit Record, *reprinted in* J.A. at 87. Kimberlin was released at 7:30 p.m. on Saturday, November 5.

That weekend, Kimberlin made several phone calls to arrange a telephone interview with reporters who would gather at the Mayflower Hotel in Washington, D.C. on the morning of Monday, November 7, the day before the election. Again, the interview with the press never took place. At 9:00 a.m., before the planned telephone interview, Kimberlin was once more taken to the administrative detention unit, strip searched, and locked in a detention cell, this time for seven days. Kimberlin was allowed to call his lawyer, but not his family or the press. Kimberlin Declaration, *supra*, J.A. 74-75.

Thus, Kimberlin was confined in administrative detention on two separate occasions, either immediately after or prior to contact with the media. The *timing* of these detentions alone supports an inference that they were intended to silence Kimberlin or retaliate against him for speaking to the media. This inference is further supported by the conflicting, and seemingly pretextual, explanations offered by Directors Quinlan and Miller regarding the reasons for Kimberlin's detentions. Indeed, there are many details of the Quinlan and Miller stories that strongly support a claim that they acted with a purpose to infringe Kimberlin's clearly established First Amendment rights.

First, there are inconsistencies in the Quinlan and Miller stories concerning the reason for Kimberlin's November 4 detention. In a memorandum, Quinlan explains that he instructed the El Reno officials to place Kimberlin in detention, "pending an assessment of any possible threat," after being informed that Nina Totenberg had told Miller of the DOJ that "she believed Kimberlin might be in some 'danger.'" Quinlan/ Keating Memorandum, *supra*, J.A. 95. Miller confirms that he learned from Totenberg that Kimberlin had expressed fear for his safety, but denies that safety concerns had any influence on the decision to put Kimberlin in detention. Memorandum from Loye Miller to Whom It May Concern (Oct. 11, 1989), *reprinted in* J.A. at 82, 84-85.

Second, there is further evidence that the justification that Kimberlin was placed in detention for his protection is pretextual. In a sworn statement, Totenberg denies that she "quoted Kimberlin as saying his [ ] life was in danger." Totenberg Declaration, *supra*, J.A. 80. Kimberlin also denies having expressed concern for his safety. Kimberlin Declaration, *supra*, J.A. 73-74. Furthermore, there was no reason to restrict Kimberlin's phone calls if he was in detention for his safety; in fact, prison regulations *require* the warden to establish procedures for inmates in segregation to make phone calls. 28 C.F.R. § 540.105 (1992). Yet, Kimberlin was expressly forbidden to make phone calls during the first detention until the afternoon of November 5. Kimberlin Declaration, *supra*, J.A. 74; Special Housing Unit Record, *supra*, J.A. 87.

Third, it was highly unusual for high-ranking officials such as Miller and Quinlan to become involved in an administrative detention decision. John Pendleton, congressional liaison for the BOP, told the *Legal Times* that he could not "think of another instance in which the director of the bureau made the decision to place an inmate in administrative detention. The system houses some 45,000 inmates." Aaron Freiwald, *Isolation for Inmate with Quayle Claims*, LEGAL TIMES, Dec. 19, 1988, *reprinted in* J.A. at 88, 90.

Fourth, there are conflicting and pretextual explanations regarding Kimberlin's second detention, and the Quinlan and Miller involvements with it. In various writings, Quinlan denies that he or the BOP's Central Office was involved in ordering the second detention. Quinlan/Keating Memorandum, *supra*, J.A. 96; Letter from J. Michael Quinlan to Robert W. Kastenmeier (Aug. 29, 1990), *reprinted in* J.A. at 106, 108. But Miller told the *New York Times* that "Kimberlin was *twice* placed in administrative detention on the order of *J. Michael Quinlan*." *Solitary for Quayle's Accuser*, N.Y. TIMES, Dec. 20, 1988, *reprinted in* J.A. at 109 (emphasis added). Furthermore, on November 7, Quinlan was sent the tapes of Kimberlin's telephone conversations "with numerous news media personnel, family and friends," and the report of an investigative supervisor at the prison who had "spent the past three days" working on the case. Memorandum from T.C. Martin to J. Michael Quinlan (Nov. 7, 1988), *reprinted in* J.A. at 111. Thus, there is evidence that strongly suggests that Quinlan was following Kimberlin's situation closely, and may well have been involved in ordering the second detention. Miller, who also denies involvement with the second detention, acknowledges that he called the BOP on the morning of November 7 and learned that Kimberlin had again been detained. Miller Memorandum, *supra*, J.A. 85-86. Thus, Miller too was closely tracking Kimberlin's status.

The explanation that Quinlan and the BOP have offered for the second detention is contradicted by prison documents. In a letter to Senator Joseph Biden, Quinlan stated that Kimberlin was sent to detention for a violation of prison regulations committed on *Monday, November 7*, when he attempted to place a call through a third party. Letter from J. Michael Quinlan to Joseph R. Biden, Jr. (Dec. 22, 1988), *reprinted in* J.A. at 77, 78. In a later letter, Quinlan wrote that "Kimberlin was *attempting to set up a telephonic press conference*, using an impermissible 'third party' procedure .... The telephone violation was the sole reason that the local officials decided to place him in detention on Monday morning ...." Quinlan/Kastenmeier Letter, *supra*, J.A. 108 (emphasis added); *see also* Administrative Claim,

supra, J.A. 68-69 (stating that "[o]n Monday, November 7, 1988, upon review of intelligence information, it was determined that Mr. Kimberlin was attempting to use the telephone to set up a press conference in Washington, D.C. that morning. As a result, Mr. Kimberlin was again placed in administrative detention . . . ."). According to prison documents, however, Kimberlin was charged and found guilty of violating prison regulations for placing a third-party phone call on *Friday, November 4*, when he had attempted to call Susan Estrich, the manager of the Dukakis campaign, through a third party. *See* Incident Report (Nov. 7, 1988), *reprinted in* J.A. at 53; Disciplinary Hearing Report (Nov. 14, 1988), *reprinted in* J.A. at 56, 56-57.

Miller himself has contradicted the BOP's explanation that Kimberlin was placed in detention for violating prison telephone rules. Miller wrote in a memorandum that "[i]t was certainly my understanding at the time that it was this attempt to hold an unauthorized press conference which directly caused [Kimberlin] to be segregated once again." Miller Memorandum, *supra*, J.A. 86. The *Legal Times* quotes Miller as saying that "[t]he BOP caught on that [Kimberlin] was going to hold another press conference, . . . so they put him back in." *Isolation for Inmate*, *supra*, J.A. 90.

Fifth, there is uncontested evidence that the Bush-Quayle campaign was in close contact with Quinlan at the BOP and Miller at the DOJ during the time when Kimberlin was trying to contact the media and being placed in detention, and that Bush-Quayle campaign officials were concerned about the possible impact of Kimberlin's story on the election. According to Quinlan, the Bush-Quayle campaign called the BOP on November 3 to learn more about the NBC interview with Quinlan. Quinlan/Keating Memorandum, *supra*, J.A. 96. When campaign official Mark Goodin learned about the press conference that was to take place on November 4, he called the DOJ and spoke with Miller and one of his assistants. Miller's assistant informed Goodin that, "unless there was an immediate security concern, . . . it was within a prisoner's parameters to [hold a

press conference.]" Goodin Deposition, *supra*, J.A. 104. Miller, who was already apprised of the press conference, confirmed his assistant's information:

> [Goodin] said "This Kimberlin fellow apparently is going to have a press conference. I'm amazed."
>
> [Miller] said, "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations."
>
> And [Goodin] said, "I am bowled over."
>
> And [Miller] said, "Its a fact."

Id. at 105.

Further, Goodin was in close contact with Miller over the weekend of November 5, when Kimberlin was setting up his telephone interview for November 7. Goodin called Miller several times that weekend to ask about the Kimberlin situation and to update Miller on the Quayle campaign's strategy if the Kimberlin story were to break. Goodin told Miller that he planned to travel with Quayle on Monday to handle press relations. Miller Memorandum, *supra*, J.A. 85.

Sixth, Quinlan's explanation of his sudden decision to cancel the November 4 press conference at the prison is entirely suspect. Reporters were told that the press conference was cancelled due to "unfor[e]seen circumstances." Press Release, *supra*, J.A. 37. Quinlan later wrote in a memorandum that he learned about the press conference from a wire service's inquiry, and that his decision to cancel the conference was based on "the fact that the Bureau's policy on media access permits individual media contacts by inmates, as well as small press pools under specialized circumstances, but does not authorize

inmate press conferences." Quinlan/Keating Memorandum, *supra*, J.A. 95. Contrary to Quinlan's statement, however, the BOP's regulations do *not* disallow press conferences. *See* 28 C.F.R. § 540.63(h)(4) (permitting the Warden to "[l]imit the . . . number of media personnel entering the institution if the Warden determines that the requested . . . personnel would create a disruption within the institution"); *see also* 28 C.F.R. § 540.64 (permitting the Warden to establish a press pool "whenever he or she determines that the frequency of requests for interviews and visits reaches a volume that warrants limitations"). In fact, prison officials at El Reno initially suggested the press conference. Administrative Claim, *supra*, J.A. 67.

Miller of the DOJ may also have been involved in the cancellation of the November 4 press conference. According to Miller, he called the BOP on November 4 to ask about the press conference. He did not talk to Quinlan, and was unsure whether the BOP knew about the press conference before his call. An hour or two later, Miller heard that, "when Director Quinlan had learned that the prison warden was about to allow a Kimberlin press conference, he (Quinlan) had ordered it called off." Miller Memorandum, *supra*, J.A. 82-83. According to Nina Totenberg's affidavit, Miller told her that the press conference had been cancelled per orders from the DOJ. Totenberg Declaration, *supra*, J.A. 80.

To summarize, the record shows that Quinlan and Miller have offered conflicting, inconsistent and seemingly pretextual explanations for Kimberlin's detentions on November 4 and 7. There is further evidence that the Bush-Quayle campaign officials were in close contact with Miller during the time of Kimberlin's detentions and were upset over the possibility of Kimberlin's story receiving media attention. Quinlan (and possibly Miller) directly prevented Kimberlin from speaking with reporters on November 4, and Quinlan has offered an incredible explanation for his decision to cancel that press conference. The record thus contains powerful circumstantial evidence of the

defendants' illegal motivation for placing Kimberlin in detention.

The information that Kimberlin has presented also satisfies a heightened pleading standard (assuming we may apply one). He has provided the specific dates, events and actions surrounding his allegations, thereby putting the defendants on notice of the charges against them. He has corroborated the facts pled in his allegations with administrative documents and newspaper articles, and has provided reliable evidence -- such as affidavits and federal regulations -- that cast suspicion on the veracity of the defendants' denials. He has also alleged that the defendants took certain action -- specifically, causing him to be placed in administrative detention -- that, if proven at trial, would support the inference that the defendants acted with impermissible motive. In short, the plaintiff has provided nonconclusory, factually-based, and specific allegations of unconstitutional intent. To expect more from Kimberlin would be to compel him to prove his case at the pleading stage, something that neither the Federal Rules nor common sense require.

II. THE HEIGHTENED PLEADING STANDARD

Generally, in civil cases, plaintiffs are entitled to discovery if they set forth in their complaint a "'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting FED. R. CIV. P. 8(a)(2)). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), however, the Supreme Court concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18. The purpose of the qualified immunity rule in *Harlow* was to dispose of "insubstantial" claims prior to discovery and trial. *See id.* at 815-16. Thus, *Harlow* held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their

conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Although the Court purported to eliminate inquiry into the subjective intent of Government officials, *Harlow* did not discuss cases in which unconstitutional motive is an essential element of the claim.

Two years after the decision in *Harlow*, this court considered the question not reached in *Harlow*. In *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the court held that, in cases in which the motive of Government officials is an essential element of the claim, a plaintiff's pleading must rest on nonconclusory allegations to support a claim of unconstitutional motive. *See id.* at 29. *Hobson* did not distinguish between "direct" and "circumstantial" evidence; however, six years after *Hobson*, in *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991), a different panel of the court held that a plaintiff's pleadings must provide direct, as opposed to circumstantial, evidence of unconstitutional motive in order to survive a motion to dismiss.

Hobson and *Siegert* are irreconcilable in their commands, thus it appears that the panel in *Siegert* ignored the law of the circuit in adopting a "direct evidence rule." Nonetheless, the majority in this case ignores *Hobson* and relies on *Siegert*, instead, in dismissing Kimberlin's case. Even if *Siegert* can somehow be read merely as an "outgrowth" of *Hobson* -- a fanciful claim, I think -- it ought to be reconsidered by the court *en banc*. The simple truth here is that a "direct evidence rule" finds no support in the Federal Rules, is at odds with Supreme Court precedent, defies the case law of this and other circuits, and is a nonsensical notion.

As an initial matter, as noted above, the Supreme Court's recent decision in *Leatherman* calls into question even the underlying rationale of the heightened pleading standard in *Hobson*. In *Hobson*, this court justified the heightened pleading requirement as a "firm application of the Federal Rules of Civil Procedure." *See Hobson*, 737 F.2d

at 29-30 & n. 86 (citing *Butz v. Economou*, 438 U.S. 478, 508 (1978)). In *Leatherman*, however, the Supreme Court held that it was "*impossible to square*" a heightened pleading standard similar to the one in *Hobson*[20] with the "liberal system of 'notice pleading' set up by [FED. R. CIV. P. 8(a)]." *Leatherman*, 113 S. Ct. at 1163 (emphasis added). Further, the Supreme Court noted that Rule 9(b) contains an exclusive list of actions for which particularized pleading may be required, and that, in the absence of an amendment to the Rules, the courts may not require particularized pleading in causes of action not listed in Rule 9(b). *Id.*; *see* FED. R. CIV. P. 9(b) (requiring particularized pleading in cases alleging fraud and mistake). The Court's decision in *Leatherman* thus employs a strict reading of Rules 8 and 9 that suggests strongly that any heightened pleading standard is *impossible to square* with the Rules, and is therefore invalid.[21]

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[20] The heightened pleading standard struck down in *Leatherman* required "'that the plaintiff's complaints state with factual detail and particularity the basis for the claim.'" 113 S. Ct. at 1163 (quoting *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)).

[21] The majority's suggestion that *Leatherman* is distinguishable because it spoke only to the standard of pleading for motions to dismiss, *see* Maj. Op. at 9 n.9, is disingenuous. Although the majority chooses to treat appellants' motion as one for summary judgment, the majority's reading of this court's precedents makes clear that it would reach the same result were this strictly a motion for dismissal. *See id.* at 8 (D.C. Circuit's heightened pleading standard "requir[es] pleading of specific *direct* evidence of intent to defeat a motion to dismiss") (emphasis in original); 9 (citing cases applying heightened pleading standard to motions to dismiss, *e.g.*, *Siegert*; *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990)).

Moreover, calling plaintiff's burden one of "production" rather than "pleading" draws a distinction without a difference. For the fact remains that in this circuit, plaintiffs alleging unconstitutional motive are not afforded *any* discovery unless their *pleadings* meet a certain threshold, higher than that required by the Federal Rules of Civil Procedure. In the ordinary summary judgment context, Rule 56(f) expressly gives the trial judge broad discretion to order discovery prior to ruling on a summary judgment motion, where the party opposing the motion cannot "present by affidavit facts essential to justify the party's opposition . . ." FED. R. CIV. P. 56(f). Yet the cases on which the majority relies effectively strip the trial judge of that discretion. *See Siegert*, 895 F.2d at 802 (plaintiff must plead intent with specific, discernible facts or direct evidence "in order to obtain even limited discovery"); *Whitacre* 890 F.2d at 1171 n.4 (plaintiff's claim "must be dismissed immediately" in absence of direct evidence of unconstitutional intent). The net effect, therefore, is to require plaintiffs'

Even if we assume that *some* form of a heightened pleading requirement may be imposed in cases involving a qualified immunity defense, today's holding still cannot stand. Nothing in *Hobson* reasonably can be read to invoke a categorical distinction between direct and circumstantial evidence. Rather, the court in *Hobson* ruled that,

> in cases involving a claim that defendants acted with an unconstitutional motive, we will require that *nonconclusory allegations [or] evidence of such intent* must be present in a complaint for litigants to proceed to discovery on the claim. The allegations on this issue need not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds.

737 F.2d at 29 (emphasis added). *Hobson* also stated that "*Harlow* requires that merely conclusory allegations of unconstitutional motive, *devoid of factual support*, must be found lacking and dismissed." *Id.* at 31 (emphasis added). Thus, the pleading standard in *Hobson* was intended to ensure that there was a factual basis for the plaintiff's allegations and that Government officials be put on notice of the specific claims against them; *Hobson* was not concerned about the plaintiff's use of direct as opposed to circumstantial evidence.[22]

The court's later decision in *Siegert* inexplicably characterizes the complaint in *Hobson* as "an example of

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pleadings to meet a higher threshold than is required by the Rules -- a result that *Leatherman* disparages.

22 The *Hobson* panel derived its heightened pleading standard from the Second Circuit's requirement of pleading with particularity in civil rights complaints. The Second Circuit's rule provides that "complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed." *Hobson*, 737 F.2d at 30 (quoting *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977)).

allegations of direct evidence of improper motivation that *will* overcome a defense of qualified immunity." *Siegert*, 895 F.2d at 804. A careful examination of *Hobson* reveals that the complaint in that case referred to memoranda that provided "direct evidence" of the unconstitutional intent of only two of the five *Hobson* defendants; the illegal intent of the other three *Hobson* defendants was established by strong circumstantial evidence. *See Hobson*, 737 F.2d at 8-9 (noting that incriminating memoranda were issued by defendants Brennan and Moore, but not by defendants Jones, Grimaldi and Pangburn).[23] If *Siegert* really meant to adhere to *Hobson* as it arose and as it was decided, then the direct evidence requirement enunciated in *Siegert* cannot be seen to rest on a categorical distinction between direct and circumstantial evidence, and the pleading standard in *Siegert* can be reconciled with the pleading standard in *Hobson*. Instead of direct evidence, *Siegert* can be read to require precise, nonconclusory allegations supported by direct *or circumstantial* evidence of unconstitutional intent -- which is exactly what the complaint in *Hobson* provided. *See Kimberlin v. Quinlan*, 774 F. Supp. 1, 6 (D.D.C. 1991) (reasoning that *Siegert* "does not appear to have turned on the distinction between direct and circumstantial evidence as understood in the law of evidence, but on the question whether the plaintiff had proffered something other than mere conclusions, namely tangible allegations of concrete facts corroborative of [the plaintiff's] own subjective version of the events"). However, if the *Siegert* court really meant to

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[23] *Siegert* noted that "[the *Hobson*] complaint referred to specific memoranda admitting that the [COINTELPRO-New Left] program's express purpose was to disrupt plaintiffs' political activities." *Siegert*, 895 F.2d at 804. In fact, only two of the five *Hobson* defendants were actually authors of some of the incriminating memoranda; the other three defendants were known to have been supervisors in a division of the FBI during the time in which that division had engaged in COINTELPRO activities. *See Hobson*, 737 F.2d at 8-9. The "specific memoranda" to which the *Hobson* complaint referred had been summarized in a 1976 Senate Report studying the Government's domestic intelligence activities. *See id.* at 10 n.8; *see also* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK II, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. No. 755, 94th Cong., 2d Sess. 86-93, 211-23 and accompanying footnotes (1976).

require direct as opposed to circumstantial evidence, then the pleading standard adopted by *Siegert* cannot be reconciled with *Hobson*.

The apparent confusion of the *Siegert* majority over the meaning of the standard in *Hobson* can be traced to several decisions rendered in the aftermath of *Hobson*. In *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir. 1987), the panel majority held that a plaintiff must present "more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated . . . ." *Id.* at 1435. *Martin* borrowed the "direct evidence" language from a trial court in Maryland, which had fashioned a "direct evidence" pleading requirement out of whole cloth. *Harris v. Eichbaum*, 642 F. Supp. 1056, 1066 (D. Md. 1986), *cited in Martin*, 812 F.2d at 1435. Although this ill-chosen language appears to be the source of the direct evidence standard, a close examination of the reasoning in *Martin* reveals that there is no basis (other than the bare, unexplained words) to believe that the *Martin* majority intended to require plaintiffs to plead direct, as opposed to circumstantial, evidence of unconstitutional motive. Certainly, there is no reason to elevate this language, plucked from a district court opinion, over the binding precedent established by this court in *Hobson*.

First, and most tellingly, the majority opinion in *Martin* explicitly affirmed an intention to remain faithful to *Hobson* . In its holding, *Martin* instructed the trial court to defer its decision on the defendants' motion for summary judgment until after the plaintiff had obtained limited discovery[24] and had presented "an amended complaint

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[24] In *Martin*, the primary issue was whether the defendants might obtain limited discovery for the purpose of meeting the heightened pleading standard, and the secondary issue was whether the pleadings in the case were sufficient. The panel majority held that strictly limited discovery could be allowed before a plaintiff was required to meet the heightened pleading standard. 812 F.2d at 1438. Judge Starr entered his strong dissent to the *Martin* majority's decision to allow this limited discovery. *Id.* at 1439-40, 1442 (Starr, J., dissenting in part). The *en banc* court thereafter granted rehearing and vacated the section of the *Martin* majority opinion that discussed the pleading standard and allowed

meeting the standard set out in Hobson, 737 F.2d at 29." *Martin*, 812 F.2d at 1438 (emphasis added). Thus, *Martin* purported to be faithful to the heightened pleading standard in *Hobson*. *See also id.* at 1434 (quoting *Hobson*, 737 F.2d at 30, that plaintiffs "must 'produce some factual support for their claim [of unconstitutional motive] to avert dismissal'"); *id.* at 1438 (Edwards, J., concurring) (noting that "the majority opinion is not unfaithful to the teachings of *Hobson*"). The logical conclusion is that *Martin* simply intended to restate the *Hobson* pleading requirement. Most certainly, there is nothing in *Martin* that shows an intent to replace *Hobson* with a more rigorous pleading standard.

Second, *Martin* was concerned with the *overall probative quality* of the plaintiff's evidence at the pleading stage, not with its characterization as direct or circumstantial. *Martin* characterized its heightened pleading standard as a "*[l]imitation* [] . . . on the range of inferences a trial court may draw," (not as a *prohibition* on the trial court's reliance on inferences), and illustrated the standard with examples from antitrust cases. *Id.* at 1435-36 (emphasis added). A review of the cited antitrust cases confirms that *not one of them* invokes a distinction between direct and circumstantial evidence. *See especially Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (permitting "direct *or circumstantial*" evidence to support an inference of conspiracy) (emphasis added), *cited in Martin*, 812 F.2d at 1436. *Martin* also concluded that "[the plaintiff's] fact recitations, as they now stand, are *insufficiently probative* of the alleged unconstitutional motive to warrant denial of the

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limited discovery. *Martin v. D.C. Metropolitan Police Dep't*, 817 F.2d 144 (D.C. Cir. 1987) (en banc).

On its own motion, the court later denied rehearing *en banc*, *Bartlett v. Bowen*, 824 F.2d 1240, 1241 (D.C. Cir. 1987) (en banc), and reinstated the majority and dissenting opinions. In the statements attached to *Bartlett*, the debate over the precedential value of *Hobson* focuses not on the formulation or wording of the heightened pleading standard, but rather on whether a plaintiff should be permitted limited discovery for the purpose of meeting the heightened pleading standard announced in *Hobson*. *Id.* at 1245-46 (Ginsburg, R.B., J., concurring); *id.* at 1246 (Silberman, J., concurring); *id.* at 1249 (Bork, Starr, Buckley, Williams & Ginsburg, D.H., J.J., dissenting in a joint statement).

[defendants'] motion for summary judgment." 812 F.2d at 1436 (emphasis added); *but see id.* (noting that the plaintiff had produced no direct evidence of the defendants' unconstitutional motive). Needless to say, this focus on the probative quality of the evidence is entirely consistent with the pleading requirement in *Hobson*.

The distortion of *Hobson* can also be traced to *Whitcare v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990), in which the court incorrectly opined that *Martin* "made clear that if a plaintiff failed to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." *Id.* at 1171 n.4. *Whitacre* has no precedential weight, however, because the court in that case did not rely on the plaintiff's lack of direct evidence when it dismissed the plaintiff's claim. *Id.* at 1172.

The *Siegert* majority attempted to summarize and clarify the court's holdings in *Hobson*, *Martin* and *Whitacre*, but, in so doing, the majority mistakenly latched onto the "direct evidence" language in *Martin* and incorrectly concluded that,

> under this court's heightened pleading standard, in order to obtain even limited discovery, [unconstitutional] intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent.

Siegert, 895 F.2d at 802. Indeed, the *Siegert* majority insisted that the plaintiff must offer direct evidence of impermissible motive, contrasting "direct" with "circumstantial" evidence in at least two places in the opinion, *see. Id.* at 802, 803, even though there is no foundation for this pleading standard in either *Hobson* or *Martin* -- the two cases upon which *Siegert* principally relied.

Regrettably, the Supreme Court did not address the heightened pleading standard when it affirmed the court's

judgment in *Siegert*.[25] However, Justice Kennedy specifically wrote in a separate concurrence that he would "reject . . . the Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence." *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring). Instead, Justice Kennedy wrote that a heightened pleading standard should require a plaintiff to "put forward specific, nonconclusory factual allegations which establish malice, or face dismissal." *Id.* In his dissent, Justice Marshall (joined by Justices Blackmun and Stevens) also stated that the court of appeals "erred in holding" that a plaintiff must proffer "*direct* evidence of the unconstitutional motive." *Id.* at 1800 (Marshall, J., dissenting). At least three justices of the current Supreme Court have therefore made plain that they believe that a "direct evidence rule" is error.

Following the Supreme Court's decision in *Siegert*, this court's application of the heightened pleading standard has floundered. In *Hunter v. District of Columbia*, 943 F.2d 69 (D.C. Cir. 1991), the panel held that "[t]he [heightened] pleading standard requires no more than that the plaintiff tell his story, relating the pertinent information that is already in his possession." *Id.* at 76 (citing to Justice Marshall's dissent in *Siegert* for analogous support). Shortly after *Hunter* was decided, in *Crawford–El v. Britton*, 951 F.2d 1314 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 62 (1992), the court applied the *Hobson* formulation of the heightened pleading standard without reference to the direct evidence requirement in *Siegert*.[26] *Id.* at 1317 (quoting *Andrews v. Wilkins*, 934 F.2d 1267, 1269–70 (D.C. Cir. 1991) (quoting *Hobson*, 737 F.2d at 30)). *Crawford–El* also noted that *Hunter* had clarified the scope of this circuit's heightened pleading standard. *Id.* at 1322. If nothing else, *Hunter* and *Crawford–El* show that there is considerable confusion in this circuit

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[25] The Supreme Court affirmed on the basis that the plaintiff's allegations, even if true, did not state a claim for the violation of any rights protected by the Constitution. *Siegert*, 111 S. Ct. at 1791.

[26] *Crawford–El* cited *Siegert*, *Whitacre*, and *Martin*, but made no reference to direct evidence. *Crawford–El*, 951 F.2d at 1317–18.

about the correct formulation of the heightened pleading standard.

To summarize, the heightened pleading standard, as originally formulated in *Hobson*, makes no mention of "direct evidence" and does not provide the basis of a pleading standard that requires direct, as opposed to circumstantial, evidence. The "direct evidence" language that forms the basis of the majority's holding today arose out of thin air in *Martin*, borrowed from a district court opinion that likewise conjured the language out of thin air. While the "direct evidence" language in *Martin* was reconcilable with the *Hobson* standard, subsequent cases such as *Whitacre* and *Siegert* have poured an unintended significance into the language that is fundamentally irreconcilable with the standard in *Hobson*.

Faced with an irreconcilable difference between two heightened pleading standards, a panel of this court is not free to overrule the original standard with a subsequent distortion of that standard. The pleading requirement in *Hobson* is binding precedent. *See Martin*, 812 F.2d at 1440 (Starr, J., dissenting in part) ("Even if one has latter-day doubts as to *Hobson* wisdom, the pleading requirement which it so clearly articulates is the law of this circuit. We are bound to follow it.").

III. THE DISTINCTION BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE

It is also incomprehensible to me why this court would want to adopt a test that compels plaintiffs to base their pleadings on "direct evidence" or suffer dismissal -- unless the court intends to eliminate all civil rights actions involving unconstitutional motive. As noted in *Harlow*, the purpose of the qualified immunity defense is to winnow out insubstantial claims before they reach discovery and trial. *Harlow*, 457 U.S. at 815-18. But the distinction between direct and circumstantial evidence is irrelevant to determining the likely merits of a claim.

It is indisputable that the probative value of circumstantial evidence, is "intrinsically no different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954), and can in some cases be "more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). Circumstantial evidence can be of high probative quality. For example, if one goes to bed and there is no snow on the ground, and one wakes up to find snow on the ground, the snow is powerful evidence -- albeit wholly circumstantial -- that it snowed while one was asleep. Conversely, direct evidence can consist of something as incredible and unreliable as the testimony of a convicted perjurer who asserts that the defendant confessed his intent and motive to him. If Kimberlin supported his pleadings with one such affidavit, the majority would now be constrained to allow him to continue with his suit. I see no reason why this type of direct evidence should suffice to allow a plaintiff to proceed to discovery, when strong circumstantial evidence of a pattern of conduct that overwhelmingly supports an inference that the defendants acted with unconstitutional motive -- evidence that Kimberlin has proffered -- would not. Redress for violations of the Constitution surely should not rest on such flimsy distinctions.

It is also well-recognized that, in almost any claim involving motive, a defendant's state of mind is typically established by circumstantial evidence because of the difficulty in obtaining direct evidence of motive.[27] In criminal cases, for example, where the burden of proof is considerably higher than in a *Bivens* suit, this court and others have recognized that "[i]ntent may, and generally must, be proved circumstantially; normally, the natural probable consequences of an act may satisfactorily evidence the state of mind accompanying it." *United States v. Jackson*, 513 F.2d 456, 461 (D.C. Cir. 1975) (footnotes omitted).[28] Nor does this court distinguish between direct and circumstantial evidence when evaluating the sufficiency of the evidence in a criminal case. *United States v. Lam Kwong-Wah*, 924 F.2d 298, 303 (D.C. Cir. 1991) ("No distinction is made between direct and circumstantial evidence in

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27 *United States v. Bank of New England, N.A.* 821 F.2d 844, 854 (lst Cir.) ("Willfulness can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts."), *cert. denied*, 484 U.S. 943 (1987); *Mallette v. Scully*, 752 F.2d 26, 32 (2d Cir. 1984) ("Because intent is formed in the mind in secrecy and silence . . ., a determination of whether a deliberate intent was formed must be drawn from all the circumstances of the case. Circumstantial evidence of this subjective fact is therefore indispensable."); *United States v. Pope*, 739 F.2d 289, 291–92 (7th Cir. 1984) ("Proof of the requisite state of mind need not be by direct evidence; it may be inferred from the surrounding fcts and circumstances."); *United States v. Hudson*, 717 F.2d 1211, 1213 (8th Cir. 1983) ("Willfulness, intent and guilty knowledge may also be proven by circumstantial evidence and frequently cannot be proven in any other way."); *United States v. Childs*, 463 F.2d 390, 392 (4th Cir.) ("Intent is not susceptible of direct proof; it must be proved by circumstances.") (footnote omitted), *cert. denied*, 409 U.S. 966 (1972); 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 411 (2d ed. 1982) ("Though circumstantial evidence is used in virtually every criminal case, there are certain kinds of cases and issues on which it is almost indispensable, because it is so unlikely that direct evidence will be available. These include such matters as the existence of a conspiracy, criminal intent, or other issues involving state of mind.") (footnotes omitted); 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 242, 244, 245 (Chadbourn rev. 1979) (intent, knowledge, belief, and state of mind may be evidenced by external circumstances and the defendant's conduct).

28 *See also United States v. Maggitt*, 784 F.2d 590, 593 (5th Cir. 1986) (same); *United States v. Harris*, 558 F.2d 366, 369 (7th Cir. 1977) (same); *United States v. White*, 557 F.2d 233, 236 (10th Cir. 1977) (per curiam) (same).

evaluating the sufficiency of evidence supporting a guilty verdict."), *cert. denied*, 113 S. Ct. 287 (1992); *see also United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984) (ruling that "circumstantial evidence alone can sustain a guilty verdict and that to do so, circumstantial evidence need *not* remove every reasonable hypothesis except guilt").

If circumstantial evidence suffices to prove intent beyond a reasonable doubt in a *criminal trial*, it should certainly satisfy this court's heightened *pleading* standard in a *civil* case. Indeed, to require plaintiffs to plead direct evidence of intent is to require plaintiffs to provide more evidence at the pleading stage than is required to win the case at trial. *See Crutcher*, 883 F.2d at 504 (rejecting direct evidence requirement because it would require plaintiff "to come forth with more evidence than she would have to produce to prevail on the merits"); *see also American Communications Ass'n v. Douds*, 339 U.S. 382, 411 (1950) (noting that "courts and juries every day pass upon knowledge, belief and intent . . . having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred").

Given the recognized difficulty of proving intent by direct evidence, the effect of a direct evidence pleading requirement will be to prevent a plaintiff from overcoming the qualified immunity defense except in the most extraordinary circumstances. In *Hobson*, for example, a 15-month "intensive" investigation by a Select Committee of the United States Senate turned up direct evidence that *two* of the five *Hobson* defendants had acted with intent to violate the plaintiff's civil rights. *See* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, *supra* note 6, BOOK I, FOREIGN AND MILITARY OPERATIONS AT III. If a direct evidence requirement has been applied in *Hobson*, however, the complaints brought against the other three defendants would have been dismissed for lack of direct evidence of intent. *See supra* note 6 and accompanying text.

Justice Marshall recognized this effect in his dissenting opinion in *Siegert*. Justice Marshall wrote that, "[b]ecause evidence of [unconstitutional] intent is peculiarly within the control of the defendant, the 'heightened pleading' rule employed by the Court of Appeals effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying claim." *Siegert*, 111 S. Ct. at 1800–01 (Marshall, J., dissenting). Two other circuits have wisely rejected a heightened pleading standard that requires direct evidence for this very reason. *Branch*, 937 F.2d at 1386-87 (9th Cir.) ("Because evidence of intent is largely within the control of the defendant and often can be obtained only through discovery, we are unwilling to require a plaintiff to present direct evidence of that intent in order to avert dismissal."); *Elliott*, 937 F.2d at 345 (7th Cir.) ("Requiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed."); *see also Siegert*, 895 F.2d at 806 (Wald, C.J., dissenting in part) ("The policy of requiring specific, direct evidence of the defendant's unconstitutional intent, when unflinchingly applied to all cases in which a qualified immunity defense is raised, effectively cuts off both bona fide and ill–motivated suits.").

A pleading standard that effectively precludes all *Bivens* actions that involve unconstitutional motive is a cynical perversion of this court's responsibility to strike a balance between the "evils inevitable" in resolving immunity questions–the evil of shutting out meritorious civil rights claims, and the evil of exposing Government officials to the burdens of litigation and liability. *Harlow*, 457 U.S. at 813-14. And, because the direct evidence requirement effectively precludes an entire class of civil rights claims, it stands in flat contradiction with the dictates of *Bivens* itself, which reaffirmed the notion that "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). As both Justice Kennedy and Justice Marshall indicated in *Siegert*, there is "no warrant for . . . a [direct evidence] rule

as a matter of precedent or common sense." *Siegert*, 111 S. Ct. at 1801 (Marshall, J., dissenting); *id.* at 1795 (Kennedy, J. concurring) ("Circumstantial evidence may be as probative as testimonial evidence.").

IV. CONCLUSION

In an admonition all too prescient, the *Hobson* panel cautioned the court against applying its heightened pleading requirement too rigidly, lest it result in the dismissal of meritorious claims. *Hobson*, 737 F.2d at 30–31. But this is exactly what has happened in this case. We must not lose sight of what has happened here. A citizen of the United States suggested to the media that he had damaging information about the candidate for the second-highest executive position in our democracy. Just days before the election, he was twice placed in "administrative detention," where he was effectively precluded from sharing his story with an understandably curious media. While we might expect such official action not to raise eyebrows in a country with fewer guarantees of civil liberty, such action is unfathomable in this country under our constitutional system of government. I simply cannot imagine that the judiciary of the United States will shut the doors of the courthouse and refuse to allow Kimberlin's suit to proceed for the specious reason that his complaint is based on circumstantial evidence.

I dissent.

APPENDIX B

IN THE

United States District Court

FOR THE DISTRICT OF COLUMBIA

Issued: August 6, 1991

No. 91-5315

BRETT C. KIMBERLIN,
Plaintiff,

v.

MICHAEL J. QUINLAN, *et al.*,
Defendants.

OPINION

This suit charges that, in the fall of 1988, just prior to the presidential election, the plaintiff, at that time an inmate at the El Reno Federal Correctional Institution in Oklahoma,[1] contacted national and local journalists to inform them that in 1971 he had sold marijuana to Dan Quayle, then a candidate for and now Vice President of the United States. The complaint further alleges that plaintiff was prevented from speaking to the journalists by being placed in an isolation cell, and that he was subsequently retaliated against when he persisted in his attempts to

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[1] Plaintiff is now incarcerated in Tennessee, serving a lengthy prison sentence for offenses involving drug smuggling and the use of explosives.

contact the press. The action is now before the Court on defendants' motions to dismiss.[2]

I. FACTUAL BACKGROUND

According to the complaint, Kimberlin was interviewed by NBC News on the afternoon of Friday, November 4, 1988, four days before the presidential election, and he was scheduled to have another interview, this time with a group of reporters, at 7:00 p.m. that same day. However, before the second interview could take place, defendant J. Michael Quinlan, the Director of the Bureau of Prisons, cancelled the meeting and ordered Kimberlin to be placed in administrative detention[3] where he remained until the next day. Two days after that, on Monday, November 7, the day before the presidential election, Kimberlin planned to address a conference of reporters in Washington, D.C. via telephone, but in the morning of that day he was again placed in detention, this time to be kept for seven days, until November 14. Kimberlin was placed in detention a third time, from December 22 until December 23, 1988.

Based on these events, Kimberlin has filed *Bivens*[4] actions against two government officials, Bureau of Prisons Director Quinlan, and Loye W. Miller, Jr., at the time Director of Public Affairs of the Department of Justice, in their individual capacities, for violating his rights under the First and Fifth Amendments. It is plaintiff's claim that it was the defendants' purpose, when issuing or participating in the issuance of the first two detention orders, to prevent him from informing the press prior to the election about his transactions with Dan Quayle, and that the third detention was ordered in retaliation for his previous contacts with the

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2 One of the motions is for dismissal or for summary judgment.

3 The removal from the general prison population is variously referred to herein as detention, administrative detention, placement in an isolation cell, or administrative segregation.

4 *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

press. In their motion papers, the defendants contest plaintiff's claims. Specifically, they assert that Kimberlin's first detention was effected for his own safety, and that the second and third detentions were ordered because the correctional authorities were investigating whether he had violated prison rules against making third-party telephone calls.[5] Defendants' Statement of Material Facts at 2-4.

In addition to the *Bivens* suit, Kimberlin has filed an action under the Federal Tort Claims Act (FTCA) against the United States and against Mr. Quinlan in his official capacity. It is charged in that action that the three detentions amounted to false imprisonment, and that Kimberlin's treatment by prison guards while he was in detention constituted assault and battery. Kimberlin also claims that prison officials monitored his telephone calls in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

Pending before the Court at this time is a motion by the defendants in their individual capacities to dismiss or for summary judgment in the *Bivens* action, and a motion by the government and by Director Quinlan in his official capacity to dismiss the Federal Tort Claims Act and Title III actions.

II. ESTABLISHED CONSTITUTIONAL RIGHTS

Kimberlin's First Amendment *Bivens* claim hinges in large part on the motive of the government officials for placing him in administrative detention. While officials such as Quinlan and Miller have qualified immunity against suit, a plaintiff will prevail notwithstanding that immunity if he is able to prove that the officials were motivated by a purpose to violate rights that were clearly established at the time of the conduct in question. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Martin* v. *D.C. Metro. Police Dep't.*, 812 F.2d 1425, 1431-33, *vacated in part on other grounds*, 817 F.2d

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[5] A third-party call is a call placed to one person, who then uses a conference-line or call-forwarding capability to contact a person at another telephone number.

144, *en banc reinstated sub nom. Bartlett on behalf of Neuman* v. *Bowen*, 824 F.2d 1240 (D.C. Cir. 1987).

For purposes of analysis, it is useful to determine first whether the conduct alleged by Kimberlin in light of the officials' alleged motivation violated a right that was clearly established at the time the conduct is alleged to have occurred. On that issue, the general rule is that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

Defendants argue that prison inmates do not have a right either to face-to-face press interviews or to telephonic press conferences, and that defendant's actions therefore did not violate plaintiff's rights under the First Amendment. It would follow, of course, that such a right was not clearly established at the time of the events in question.

However, plaintiff is not claiming that there is or was a general Bureau of Prisons policy banning these methods of press contact, or that such a policy, if it existed, would violate the First Amendment rights of inmates. Rather, it is his contention that the prison officials cancelled one previously approved face-to-face interview, prevented him from conducting other telephonic interviews, and retaliated against him for his previous contacts with the press -- all not because these activities contravened a general prohibition on contacts with the press but because of the content of what he was expected to say to the journalists.

It was clearly established in November 1988 that, absent special circumstances, federal prison inmates have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech. As early as 1975, the Court of Appeals for the Third Circuit ruled explicitly that the First Amendment prohibits prison officials from granting or denying a prisoner's interview with the press based on the content of

that interview. *Main Road* v. *Aytch*, 522 F.2d 1080, 1086-87 (3d Cir. 1975), where the court stated that the "First Amendment precludes [a prison official] from regulating, through the grant or denial of permission for prisoners to talk with reporters, the content of speech which reaches the news media, unless the restriction bears a substantial relationship to a significant governmental interest."

The Supreme Court decided about the same time that a prison regulation that restricts prisoners' contact with the press is valid but only "[s]o long as this restriction operates in a neutral fashion, without regard to the content of the expression." *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). And it has likewise been decided that a prison regulation that operates in the area of inmates' First Amendment rights must have some rational connection with a legitimate governmental interest, and that regulation must "operate[] in a neutral fashion, without regard to the content of the expression." *Turner* v. *Safley*, 482 U.S. 78, 89-90 (1987) (upholding ban on prisoner-to-prisoner correspondence in part because it was content-neutral). *See also, Bell* v. *Wolfish*, 441 U.S. 520, 551 (1979) (upholding content-neutral regulation requiring that hard cover books be sent only by publishers).[6]

In sum, if the officials were motivated by a purpose to keep Kimberlin from speaking to the press because of the content of his expected communications, their conduct violated a well-established right, and qualified immunity would not attached to their actions.

III. HEIGHTENED PLEADING REQUIREMENTS

The next issue revolves around the motivation of the defendants: did they intend to keep Kimberlin from speaking to the press because they were concerned about

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[6] An inmate also has a well-established right to be free from retaliation based on the content of his previous interviews with the press. *Burnham* v. *Oswald*, 342 F. Supp. 880, 889 (W.D.N.Y. 1972); *Brooks* v. *Andolina*, 826 F.2d 1266, 1268 (3d Cir. 1987); *Cavey* v. *Levine*, 435 F. Supp. 475 (D. Md. 1977), *aff'd without opinion*, 580 F.2d 1047 (4th Cir. 1978).

what he might say? That issue must be examined from two perspectives: first, did the allegations of First Amendment violations in plaintiff's papers comply with the heightened pleading requirements established in this Circuit with respect to claims of this type?, and second, were plaintiff's allegations concerning defendants' intent or motive substantively sufficient to withstand defendants' motion to dismiss? In this section of the opinion, the Court examines the law respecting the heightened pleading requirement; in the next section, it considers the facts as they are alleged by plaintiff to determine their sufficiency under that pleading requirement and in light of the motion to dismiss as such.

The defendants argue that they should not be subjected to discovery and required to undergo a trial on the basis of mere general allegations of wrongdoing, and that is certainly correct. *See Whitacre* v. *Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989); *Hobson* v. *Wilson*, 737 F.2d 1, 29, (D.C. Cir. 1984). The law is, at least in this Circuit, that a plaintiff who makes a *Bivens* claim which alleges unconstitutional motive must meet what are called heightened pleading requirements when he is faced with a motion to dismiss. *Siegert* v. *Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *affirmed on other grounds*, 111 S. Ct. 1789 (1991). Because the decision of the Court of Appeals in the *Siegert* case is central to a proper disposition of this part of the government's motion, it needs to be analyzed in some detail.

Siegert, a former employee of the federal government at St. Elizabeth's Hospital in Washington, D.C., brought a *Bivens* action alleging that his former superior had deprived him of liberty without due process by writing an allegedly defamatory letter in response to an inquiry by Siegert's prospective new employer. As in this case, the defendant moved for dismissal, or in the alternative for summary judgment, based on the defense of qualified immunity under *Harlow* v. *Fitzgerald, supra*. The District Court denied the motion and ordered limited discovery; the defendant appealed, and the Court of Appeals reversed.

The appellate court, after first assuming without deciding that a violation of the plaintiff's constitutional rights had been adequately alleged, went on to hold that the plaintiff had failed to satisfy the heightened pleading standard required in cases of that kind. In this regard, the court stated that, upon the assertion of a qualified immunity defense the plaintiff will face dismissal unless he comes forward with specific factual allegations which establish improper intent. This ruling, of course, raises the question of precisely what kind of factual pleading or record is required. On that issue, the *Siegert* opinion is susceptible of more than one interpretation, as follows.

The majority of the Court of Appeals used several different formulations regarding the necessary requirement. At one place in the opinion, the court juxtaposed "direct" evidence with "circumstantial" evidence, stating that "merely circumstantial evidence of the intent" is insufficient to entitle a plaintiff to discovery. 895 F.2d at 802. Other language, however, contrasts "direct" evidence of an impermissible motive not with circumstantial evidence of such a motive, but with "conclusory" evidence or allegations (895 F.2d at 802), and it indicates that something "more tangible [in] the record" is required than "conclusory" allegations (895 F.2d at 804).

In short, at times the *Siegert* court states that allegations and evidence that are *circumstantial* will not suffice to satisfy the heightened pleading requirement, while elsewhere it suggests that it is *conclusory* allegations or evidence that are not enough. As will be seen below, in the present circumstances the two concepts cannot be considered identical. Moreover, although in *Siegert* the equation of circumstantial evidence with conclusory evidence[7] was immaterial to the outcome, in this case the distinction between these concepts is crucial, for as discussed below, while the record before the Court on the

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7 Similarly, the court equated direct or tangible evidence with nonconclusory evidence.

key issue of defendants' motive is circumstantial, it is also tangible and far from being merely conclusory.

Other judges involved with the *Siegert* case have expressed varying views on the meaning of the Court of Appeals' *Siegert* opinion. Thus, Judge Wald, the *Siegert* dissenter, expressed the belief that the heightened pleading standard, as formulated by the majority in that case, requires the plaintiff to plead "nonconclusory" facts (895 F.2d at 805) although elsewhere in her dissent, Judge Wald speaks of a requirement of more than "inferential or circumstantial" support for the unconstitutional motive allegations (895 F.2d at 807).

The Supreme Court did not rest its affirmance of the Court of Appeals on the issue of a heightened pleading requirement.[8] However, the majority opinion authored by Chief Justice Rehnquist construed the Court of Appeals opinion both as requiring "direct . . . as opposed to merely circumstantial" evidence and as requiring something "more tangible" than the plaintiff's affidavits. 111 S. Ct. at 1792-93. Justice Kennedy, in a separate concurrence, construed the Court of Appeals opinion as requiring "specific, nonconclusory factual allegations," but he went on to state his disagreement with what he regarded as the Court of Appeals' requirement of "direct, as opposed to circumstantial, evidence." 111 S. Ct. at 1795. Justice Marshall's dissenting opinion interpreted the Court of Appeals opinion as requiring "*direct* evidence of the unconstitutional motive," contrasting that with what he regarded as Siegert's "highly specific circumstantial evidence" of such a motive. 111 S. Ct. at 1800, 1801 (emphasis in original).

Finally, the Solicitor General, in his brief to the Supreme Court in *Siegert*, stated that he did not believe that the opinion of the Court of Appeals "which focused

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[8] Instead, the Supreme Court held that the plaintiff's allegations, even if true, did not state a claim for violation of any constitutional right. 111 S. Ct. at 1794.

primarily on the conclusory nature of petitioner's assertions," was in conflict with prior Supreme Court law holding (in *Holland* v. *United States*, 348 U.S. 121, 140 (1954)), that circumstantial evidence is intrinsically no different than direct evidence.[9] Brief at pp. 20-21 n.13.[10]

This Court has concluded, on the basis of the analysis *supra*, that Kimberlin meets the heightened pleading requirement established by *Siegert*, as long as the complaint, together with the supporting exhibits before the Court, present allegations that are tangible and nonconclusory, even if these allegations would properly be regarded as circumstantial (as distinguished from direct or testimonial). That is so because *Siegert* does not appear to have turned on the distinction between direct and circumstantial evidence as understood in the law of evidence, but on the question whether the plaintiff had proffered something other than mere conclusions, namely tangible allegations of concrete

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[9] The Solicitor General's view is supported, in addition to *Holland*, by a number of other precedents. *See, e.g., United States* v. *Clark*, 506 F.2d 416, 418 (5th Cir. 1975) (the law makes no distinction between the weight to be given either to direct or to circumstantial evidence); *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) (circumstantial evidence is not only sufficient but may be more certain, satisfying and persuasive than direct evidence).

These principles are particularly apt where, as here, state of mind is at issue. *United States* v. *Jackson*, 513 F.2d 456, 461 (D.C. Cir. 1975) ("Intent may, and generally must, be proved circumstantially . . . ."); *United States* v. *Eaglin*, 571 F.2d 1069, 1076 (9th Cir. 1977) (intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind). In view of these legal principles, it is unlikely that the Court of Appeals meant in *Siegert* to exclude from consideration any and all circumstantial evidence as that term is understood in the law of evidence irrespective of its specificity and concreteness.

[10] In the same vein, the Solicitor General went on to construe the Court of Appeals as holding in *Siegert* only that the plaintiff "may not rely solely on subjective allegations, . . . attenuated inferential and circumstantial allegations, . . . or otherwise conclusory allegations . . . to support a claim of improper motive." Elsewhere his brief stated that it was not necessary to a resolution of the case by the Supreme Court to distinguish between circumstantial and direct proof as those terms are applied in the law of evidence.

facts corroborative of his own subjective version of the events.

The Court will now turn to the allegations and the exhibits and examine them both under the *Siegert* pleading requirement and in relation to the broader issue raised by the motion to dismiss: whether a motive to deprive plaintiff of his constitutional rights has been properly asserted.

IV. INTENTION OF THE OFFICIALS

It is plaintiff's contention that two of his administrative detentions were caused by the Bureau of Prisons' concern that he would speak to the press about his alleged sale of marijuana to then candidate Dan Quayle, and that the third detention constituted retaliation against him for having done so. The defendants argue in response that there were legitimate institutional reasons for the detentions, and that suppression of Kimberlin's speech regarding his alleged experiences with Dan Quayle had nothing to do with the measures taken. Plaintiff has replied in essence that the institutional reasons advanced by the defendants were mere pretexts. If plaintiff is correct in that conclusion, it would tend to show, circumstantially yet in tangible and persuasive fashion, that the defendants had the intent or motive requisite for a *Bivens* action. The Court will now examine the three Kimberlin detentions in that light.

First. According to defendants, Kimberlin was placed in administrative detention on November 4, 1988, in order to ensure his safety. That Bureau of Prisons concern, in turn, was asserted to have been triggered by statements from Loye Miller, Director of Public Affairs at the Department of Justice, to the effect that he had been advised by Nina Totenberg, a reporter for National Public Radio, of a Kimberlin complaint to her that his safety was in jeopardy. However, according to a sworn declaration of Ms. Totenberg, she "had never said any such thing," and she had so informed Miller.[11]

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[11] Exh. 4 to Plaintiff's Opposition, p. 2. Further, according to Ms. Totenberg, Kimberlin had told her by telephone on November 4 that he

Plaintiff further notes that, as the Bureau of Prisons concedes, Director Quinlan personally ordered Kimberlin's administrative detention, Exh. 1 to Plaintiff's Opposition, p. 2, and that this was the first time that the Director, who oversees some 45,000 federal inmates nationwide, had made a decision to place an inmate in one of the many institutions under his control in administrative detention. Exh. 8, p. 9. Plaintiff contends that this extraordinary event corroborates his claim that the detention decision was not a routine security measure.[12]

Quinlan also personally cancelled Kimberlin's press conference. There is some question even from the defense side as to why he did that. Quinlan explained to Senator Joseph Biden that the holding of such a press conference was contrary to Bureau of Prisons policy. Exh. 3, p. 2. However, Miller has apparently stated that Kimberlin was "within his rights to have one according to the rules and regulations." Exh. 11, p. 73.

In his effort to show that his detention was not ordered out of concern for his safety, Kimberlin alleges next that, to get him to the detention cell, he was wrestled from his room, handcuffed, marched to detention in a painful position, and strip searched, the point being that these measures are inconsistent with administrative segregation as a protection for his own safety.

Plaintiff finally relies on the fact that Miller was in continuous contact with Mark Goodin, Deputy Press Secretary to the Quayle campaign who, among other things, stated to Miller that Kimberlin's claims had to be taken seriously on account of its potential for adverse publicity;

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was concerned "about what the Justice Department might do to him." He was placed in administrative detention within an hour of his conversation with her. *Id*.

[12] Along the same line, plaintiff notes that Miller discussed the Kimberlin efforts to talk to the press with the Executive Assistant to the Attorney General (and would have discussed it with Attorney General Thornburgh himself had Thornburgh not been out of town). Exh. 5, p. 2.

that he, Goodin, planned to be present with Quayle the day before the election to handle media inquiries regarding this subject; and that the closer to the election the story were to break the better the chance that it would have adverse effects. Exh. 5, p. 4; Exh. 11, p. 22. Here again, it is plaintiff's claim that attention would not have been paid to him at these high levels if nothing more than his own safety at an institution in Oklahoma had been at issue.

Second. As indicated, Kimberlin was released on November 5, but he was again placed in administrative detention on November 7, the day before the election. In the meantime, his phone conversations were monitored, First Amended Complaint at 14, and by this means the officials had learned that on that day Kimberlin proposed once again to telephone a group of reporters. Exh. 4, pp. 3-4, Exh. 5, p. 4. But that call was never made, for Kimberlin was placed in detention before it could be made. That detention, like the previous one, was also ordered personally by Director Quinlan. Exh. F to First Amended Complaint.

The justification given by the Bureau of Prisons for the second detention was that Kimberlin had made a third-party call.[13] However, plaintiff claims the pertinent regulations do not contemplate segregation as a sanction for making a third-party call;[14] and Miller said that Kimberlin's second detention was a consequence of his intention to hold another press conference. Exh. 8, p. 9.

Third. Defendants justify Kimberlin's third detention, that of December 22, 1988, on the same basis as the second one, that is, that he had made a third-party call. But here again, there was no hearing and finding of guilt of

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13 *See* note 5, *supra*.

14 Further, an inmate may be placed in administrative detention pending investigation of alleged violation of prison regulations only "when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution." 28 C.F.R. § 541.22(a). Kimberlin apparently was not at any pertinent time period regarded as a serious threat in any of these respects.

the infraction prior to the detention as may be required by the regulations, and Kimberlin ultimately was found not guilty of misuse of the telephone. Plaintiff's claim that this detention was retaliatory or deterrent rests essentially on the timing of the event in that it occurred within a few days after press articles appeared concerning his problems at the institution on account of his contacts with the press. *See, e.g.*, Exh. F to First Amended Complaint (*New York Times* article dated December 20, 1988).

On the basis of these specific factual allegations, the Court concludes that the claims of constitutional violations made by plaintiff are (1) adequate to comply with the heightened pleading requirement of *Siegert*, and (2) otherwise sufficient to overcome defendants' motion to dismiss.

This obviously is not a final decision on the merits. The Court is not called upon at this time to determine whether, and it does not decide that, any particular claim made on behalf of plaintiff is true.[15] As noted, Quinlan, Miller, and others have provided their own explanations for the events upon which plaintiff relies, and several of these explanations are sharply at odds with those provided by plaintiff. It may be expected that defendants will hereafter provide more detailed evidentiary support for their version of the events. The Court only holds that plaintiff's allegations are sufficiently tangible, detailed, and nonconclusory that they support his request for a denial of the motion to dismiss or for summary judgment.

Accordingly, the motion will be denied, the lawsuit may proceed, and plaintiff will be afforded the right to further discovery.

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[15] Similarly, the Court's decision on the motion to dismiss does not constitute any ruling with regard to Kimberlin's claim that he had sold marijuana to Dan Quayle. Indeed, even if the defendants' motivation was as plaintiff says it was, it would not necessarily prove that there was a sale of marijuana; the defendants could have desired to keep the Kimberlin allegations from the press and the public just prior to the election whether or not they were true.

V. FIFTH AMENDMENT CLAIMS

Plaintiff next claims that Quinlan and Miller violated his Fifth Amendment rights to substantive and procedural due process.

First. Not much need be said regarding substantive due process for, as defendants correctly argue, a violation in that regard must be viewed not under the rubric of generalized due process notions but in accordance with an explicit textual source of constitutional protection. *Graham* v. *Connor*, 490 U.S. 386, 393-95 (1989). This means that plaintiff's substantive due process claim depends upon and is coextensive with his First Amendment claim. The Court has denied defendants' motion to dismiss that claim, and it accordingly survives. No purpose would be served by a consideration in this case of two First Amendment claims, one directly and the other indirectly by way of the Fifth Amendment. On this basis, the motion to dismiss the Fifth Amendment substantive due process claim will be granted.

Second. With regard to the procedural due process claim, the mandatory language in the Federal Bureau of Prisons regulations on administrative detention (28 C.F.R. § 541.22) grant Kimberlin a liberty interest in remaining free from an administrative detention that is effected without compliance with these regulations. *See Hewitt* v. *Helms*, 459 U.S. 460 (1983). However, the only procedure that was due Kimberlin under the circumstances presented by this case was an informal, non-adversary review of the basis for his detentions within a reasonable time after they began. *Hewitt, supra*, 459 U.S. at 472.

As indicated above, Kimberlin was detained on three occasions. Two of the detentions (November 4-5; and December 22-23) were of very short duration. In both instances, he was released within twenty-four hours of being detained. The Court finds that under the *Hewitt* standard, Kimberlin was released with sufficient dispatch on both of these occasions, and that whatever review the prison officials provided conformed to *Hewitt*.

As concerns the remaining detention, that of November 7, the complaint alleges that Kimberlin was released after seven days, when a local disciplinary hearing officer determined that the alleged violation did not carry the sanction of segregation from the general prison population. First Amended Complaint at 17. This decision by the officer was likewise sufficiently speedy for due process purposes. See *Hewitt, supra,* where the Supreme Court held that prison officials are to be accorded wide-ranging deference in the adoption of policies and practices that, in their judgment, are needed to preserve prison order and discipline. The Court went on to say that such officials are obligated only to engage in an informal review of the information supporting the inmate's administrative confinement "within a reasonable time after confining him to administrative segregation." 459 U.S. at 472. It so happens that the inmate in *Hewitt* did not receive even an informal review until five days after his administrative detention, and that he remained in that detention for a considerable period thereafter. Nevertheless, the Supreme Court approved the actions of the officials. Under the standards established by the Supreme Court, Kimberlin was not deprived of procedural due process.

For the reasons stated, the Fifth Amendment claims will be dismissed.

VI. FEDERAL TORT CLAIMS ACT

Plaintiff next claims that he is entitled to damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 1402(b), 2671 *et seq.*[16] This entitlement is claimed to be based on his false imprisonment and the assault and battery, stemming from Director Quinlan's order that he be placed in administrative detention, and his handling by the prison guards while they took him to that detention. The government has moved to dismiss these claims on the basis of improper venue.

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16 Plaintiff has satisfied the administrative claim requirements of the Federal Tort Claims Act.

The statute lays venue of FTCA claims only in the "district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b). Since plaintiff does not reside in the District of Columbia, the issue is whether, under the standards established by cases, the acts complained of may be said to have occurred in this District.

The government relies principally upon *Reuber* v. *United States*, 750 F.2d 1039 (D.C. Cir. 1984). In that case, where a letter of reprimand concerning the plaintiff was written and circulated in Maryland, the Court of Appeals held venue in the District of Columbia to be improper even though it appeared that the letter was eventually leaked and posted on a bulletin board in this District. The court reached that result because the plaintiff could "point to *no act* in the District by *any government employee* that caused him any tortious injury," 750 F.2d at 1046-47 (emphasis added).[17]

In the view of this Court, *Reuber* is not dispositive of the venue issues here. Unlike in that case, the plaintiff here has claimed that officials and other employees of the United States committed acts in this District that caused him injury. Specifically, the complaint alleges that Kimberlin was falsely imprisoned, *i.e.*, placed in administrative detention, as a result of a conspiracy led by Director Quinlan in Washington, D.C. While the allegation of a conspiracy including officials in Washington would not, by itself, be sufficient to confer venue here,[18] the conspiracy allegation is here fleshed out with respect to the alleged false imprisonment by specific claims that Quinlan personally ordered Kimberlin held in administrative detention on November 4 and 7, 1988; that Quinlan falsely informed regional Bureau of Prisons officials that Kimberlin had told a member of the press that his life was in danger; and that

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[17] The events in the District of Columbia could have been entirely the work of private persons, not connected with the government, and the United States therefore could not be held responsible in a FTCA claim.

[18] Conspiracy allegations are often made, particularly by inmates, even when there is no factual basis therefor.

Quinlan on November 7, 1988 approved and ratified Kimberlin's second administrative detention.[19]

In short, Kimberlin's papers allege that the impetus for his administrative detentions came from Washington, D.C., where Director Quinlan ordered that Kimberlin be detained. Based on these allegations, the Court finds that there is a sufficient nexus between the false imprisonment claim and the District of Columbia for venue to be proper here with respect to that claim.

On the other hand, the Court concludes that venue does not lie in the District of Columbia with respect to the assault and battery claim. To be sure, plaintiff argues in his opposition to the motion to dismiss that the facts alleging false imprisonment are closely intertwined with those alleging assault and battery, and that "[i]n ordering Kimberlin into confinement, Quinlan [in Washington] is responsible for the foreseeable consequences of his actions, including the assault and battery . . . ." Memorandum in Opposition at 16 n.5. The present situation involves a statutory waiver of sovereign immunity; that waiver specifies precisely in which courts venue is proper; and the venue provision must therefore be strictly construed. The Court will not conclude that venue is appropriate in this District on the assault and battery charges, since in essence the plaintiff is relying only on the presence here of alleged conspirators and on implications arising from claimed foreseeability.[20] For these reasons, the motion to dismiss will be denied with respect to the FTCA false imprisonment claim but granted with respect to the assault and battery claim.

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[19] There are also additional allegations which could conceivably support venue here, but their relationship to individuals in the District of Columbia is at this juncture not sufficiently clear.

[20] It is quite possible that the prison guards were acting on their own when they allegedly roughed up Kimberlin in the course of his transfer to administrative detention. The complaint does not allege otherwise. Certainly, the Court is unable, without more, to assume foreseeability insofar as Quinlan is concerned.

VII. CLAIMS UNDER THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Kimberlin finally claims that prison officials monitored his use of the telephone, and that this monitoring violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. § 2511. The Title III claim names Director Quinlan and the Bureau of Prisons as defendants. While the government argues to the contrary, it is established that Title III applies to prisons and prison inmates. *United States* v. *Amen*, 831 F.2d 373, 378 (2d Cir. 1987); *Campiti* v. *Walonis*, 611 F.2d 387, 392 (1st Cir. 1979); *compare United States* v. *Paul*, 614 F.2d 115, 117 (6th Cir. 1980).

The government also contends that Kimberlin consented to the monitoring of his phone calls by using prison phones, *see Amen*, 831 F.2d at 378; *Paul*, 614 F.2d at 117; 18 U.S.C. § 2511(2) (c), and that the monitoring was valid under the statute because it was performed by a "law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5) (a).

Consent may be implied, the government argues, from the fact that Kimberlin had constructive notice of the monitoring, because the Code of Federal Regulations authorizes telephone monitoring in prisons. 28 C.F.R. § 540.101. But that same regulation requires the warden to "provide notice to the inmate of the potential for monitoring." Under the circumstances of this case, the Court will not infer consent unless it can be shown that the warden gave notice to Kimberlin, alone or in conjunction with others, that the monitoring system was in place. Accordingly, before the Court would be justified in dismissing this claim, there would have to be a factual record on the notice question. Similarly, a factual record will have to be made on the issue of whether the monitoring of Kimberlin's calls occurred in the "ordinary course" of law enforcement duties. *Paul*, 614 F.2d at 117.

The motion to dismiss with respect to the Title III claim will therefore be denied, but that denial will be without prejudice to the filing of a motion for summary judgment upon the development of a further factual record.

August 6, 1991

HAROLD H. GREENE
United States District Judge

ORDER

In accordance with the opinion issued this 6th day of August 1991, it is

ORDERED That the motion to dismiss or for summary judgment on plaintiff's First Amendment claims be and it is hereby denied, and it is further,

ORDERED That the motion to dismiss or for summary judgment on plaintiff's Fifth Amendment claims be and it is hereby granted, and it is further,

ORDERED That the motion to dismiss plaintiff's Federal Tort Claims Act (FTCA) claim for false imprisonment be and it is hereby denied, and it is further

ORDERED That the motion to dismiss plaintiff's FTCA claim for assault and battery be and it is hereby granted, and it is further

ORDERED That the motion to dismiss plaintiff's claim under the Omnibus Crime Control and Safe Streets Act be and it is hereby denied without prejudice, and it is further

ORDERED That this Court's June 14, 1991 protective order preventing depositions of defendants Quinlan and Miller be and it is hereby dissolved.

HAROLD H. GREENE
United States District Judge

APPENDIX C

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued: April 1, 1994

No. 91-5315

BRETT C. KIMBERLIN,
Appellee,

v.

MICHAEL J. QUINLAN, *et al.*
Appellants.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 90-01549)

On Appellee's Suggestion For Rehearing *In Banc*

Before: MIKVA, *Chief Judge;* WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH and ROGERS, *Circuit Judges*

ORDER

Appellee's Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Therefore, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

For the Court:

Ron Garvin, Clerk

Circuit Judges SENTELLE and ROGERS did not participate in this matter.

Chief Judge MIKVA and *Circuit Judges* WALD, EDWARDS and RANDOLPH would grant the suggestion.

A statement of *Circuit Judge* WILLIAMS, joined by *Circuit Judges* SILBERMAN and BUCKLEY, and a statement of *Circuit Judge* SILBERMAN, concurring in the denial of rehearing *in banc*, are attached.

A statement of *Circuit Judge* EDWARDS, joined by *Chief Judge* MIKVA and *Circuit Judge* WALD, dissenting from the denial of rehearing *in banc* is also attached.

WILLIAMS, *Circuit Judge*, concurring in the denial of rehearing *in banc:* The imperfections of our "direct evidence" rule are plain to see. *Kimberlin v. Quinlan*, 6 F.3d 789, 798 (D.C. Cir. 1993) (Williams, J., concurring). But it represents our effort, most expressly stated in *Seigert v. Gilley*, 895 F.2d 797, 800-02 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991), to reconcile the extension of *Bivens* liability to

constitutional torts based on motive, see, e.g., *Davis v. Passman*, 442 U.S. 228 (1979), with the Supreme Court's determination in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that qualified immunity should afford officials substantial protection not merely from ruinous financial liability, but also from the burdens of litigation, including the burdens of discovery. *Id.* at 814-19.[1] It was, of course, precisely because of the Court's recognition that "questions of subjective intent so rarely can be decided by summary judgment", *id.* at 816, that it reformulated qualified immunity in *Harlow* to exclude subjective intent. There may well be better reconciliations than the "direct evidence" rule, ranging from officials' full exposure to conventional discovery, to withdrawal of *Bivens* liability for constitutional torts involving subjective intent. Drawing the line depends, under the Supreme Court's view of the *Bivens* remedy, on the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money. Indeed, as Justice Harlan observed in *Bivens* itself, the "range of policy considerations" to be taken into account is "at least as broad as the range a legislature would consider with respect to an express statutory authorization of a traditional remedy." *Bivens v. Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring). As existing precedents and our status in the judicial hierarchy preclude us from adopting many of these solutions, it seems to me on balance

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[1] Although our "direct evidence" rule is a variation on what is often referred to as a "heightened pleading" standard, in fact the "standard" normally has nothing to do with pleading, but simply allows summary judgment to be granted before the plaintiff has had as great an opportunity to subject defendant to discovery as is conventionally available. See *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991); see also *Crawford-El v. Britton*, 951 F.2d 1314, 1320-21 (D.C. Cir. 1991) (relying on numerous attachments and affidavits); but cf. *Hunter v. District of Columbia*, 943 F.2d 69, 76 (D.C. Cir. 1991).

preferable to continue with the imperfections of *Seigert* until the Supreme Court resolves the issue.

SILBERMAN, *Circuit Judge*, concurring in the denial of rehearing *en banc*. I very much appreciate Judge Edwards' endorsement of my views as to the core ingredient of judicial restraint--avoidance of judicial policymaking, policymaking often exercised in pursuit of such elusive goals as "justice," a tranquil population, or the rearrangement of our society through the discovery of new constitutional rights for favored groups or individuals. He overlooks the point, however, that Justice Harlan made when he concurred in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 398 (1971) (Harlan, J., concurring), and which the whole Court has subsequently endorsed. *See Busc v. Lucas*, 462 U.S. 367, 376-78 (1983). Recognizing with commendable candor that the Court had itself created a cause of action that neither the Constitution nor Congress had fashioned, Justice Harlan emphasized the open policymaking role that the Court has assumed. *See Bivens*, 403 U.S. at 407-10. And in a series of cases since *Bivens*, the Supreme Court and the lower federal courts have struggled with the costs and benefits of a *Bivens* action, perhaps more openly resembling legislatures than courts normally do. *See Busch*, 462 U.S. at 378; *Hubbard v. EPA Administrator*, 809 F.2d 1, 9 (D.C. Cir. 1986), *adhered to on reh'g en banc sub nom. Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (per curiam).

Those who criticize this circuit's direct versus circumstantial evidence distinction, which stems from *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1435-36 (D.C. Cir. 1987), have a logical point, but it is a point that focuses on the trees rather than the forest. As Judge Williams suggests, the Supreme Court is better positioned than we to resolve the broader problem, and, in the meantime, it can hardly be thought "an extraordinary use of judicial authority" to rest on our precedent.

Of course, in *Bivens* cases, individual government officers are sued personally, and are sometimes obliged to pay attorneys fee out of modest government salaries. That is why the Court has recognized that early dismissal of all but the few obviously meritorious cases is desirable. Apparently, the wisdom of that proposition is easier for some judges to perceive when the potential defendants are part of the judiciary. See *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990), in which no judge dissented from the denial of rehearing.

EDWARDS, *Circuit Judge*, with whom *Chief Judge* MIKVA and *Circuit Judge* WALD concur, dissenting from the denial of the suggestion for rehearing *en banc:* The panel majority in this case relied on a rule that distinguishes between "direct" and "circumstantial" evidence in reversing the District Court and dismissing the plaintiff's suit for failure to satisfy so-called "heightened pleading" requirements. In response to plaintiff's petition for *en banc* review, and after consultation with the Solicitor General's office, the Government notified the court that it would not defend the "direct evidence" standard that had been adopted by the panel majority.[2] Indeed, even the concurring

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[2] On December 6, 1993, in a Motion for Extension of Time to Respond to Petition for Rehearing *En Banc*, Government counsel from the Appellate Staff of the Civil Division of the Department of Justice gave the following advice to the court:

> In *Seigert v. Gilley*, 111 S. Ct. 1789 (1992), the Supreme Court was faced with the question of what heightened standard applies in unconstitutional motive cases. The Court did not resolve that question, and instead decided the case on other grounds. *See Siegert*, 111 S. Ct. at 1791. *See also Kimberlin*, Dissenting Op. at 19 & n.9. However, in the government's brief to the Supreme Court, the Solicitor General did not argue in support of a "direct evidence" standard. The Solicitor General noted that the Supreme Court in *Holland v. United States*, 348 U.S. 121, 140 (1954), held that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence." *See* Respondent's Br. 20-21 n.13.
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> Given the government's position in the Supreme Court in *Siegert*, before any response is filed by the government in this Court regarding appellee's petition for rehearing *en banc*, we

member of the majority acknowledged that the panel's judgment rested on a rule that is "completely arbitrary and unrelated to the strength of the plaintiff's case." *Kimberlin v. Quinlan*, 6 F.3d 789, 798 (D.C. Cir. 1993) (Williams, J., concurring). Yet, by a margin of 5 (in favor of *en banc* review) to 4 (against), with one judge recused, a plurality of the court has blocked *en banc* consideration of this case. This result is unfathomable.

In particular, I find it incomprehensible that this court has refused to rehear a case which is so clearly of great importance, and which rests upon a rule that is concededly "completely arbitrary and unrelated to the strength of the plaintiff's case." The result of our action is all the more unintelligible in light of the fact that a recent decision of the Supreme Court calls into question whether federal courts may ever apply "heightened pleading" requirements not provided for in the Federal Rules of Civil Procedure. Even assuming the validity of heightened pleading requirements generally, *Kimberlin* creates a regime under which a civil rights plaintiff must prove more to survive a motion to dismiss than he or she must prove in order to win at trial. This rule is nothing short of Kafkaesque, and ours is the only circuit that has failed to recognize this fact.

First, the Supreme Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), issued just six months before *Kimberlin*, strongly suggests that federal courts may not impose so-

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must consult with the Solictor General's Office regarding the position to be taken on the "direct evidence" rule as an original matter before the *en banc* Court. If a decision is made not to defend that standard, then the individual defendants here must be given an opportunity to decide whether they wish to seek private counsel.

Subsequently, on January 11, 1994, Government counsel withdrew their appearance and advised this court that Mr. Quinlan would be represented by private counsel in the matter pending before the *en banc* court.

called "heightened pleading" requirements in civil rights cases. However, under the rule announced by the majority in *Kimberlin*, a plaintiff making a civil rights claim that requires proof that a Government official acted with an unconstitutional motive must plead "direct evidence" of the official's intent. Plaintiffs alleging unconstitutional motive are not permitted any discovery, and are subject to dismissal unless they meet this standard. *See Kimberlin*, 6 F.3d at 804-05 n.5 (Edwards, J., dissenting). The majority's opinion in *Kimberlin* cannot be squared with *Leatherman*.

The Court in *Leatherman* held that a "'heightened pleading standard' -- more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure -- could not be applied in civil rights cases alleging municipal liability under [42 U.S.C. § 1983 (1988)]." 113 S. Ct. at 1161. Although *Leatherman* did not consider the permissibility of heightened pleading requirements in cases involving individual Government officials, because that question was not before the Court, the logic of the decision indicates that *all* such requirements are improper, except as expressly required by the Federal Rules. This conclusion can be gleaned from the Court's unequivocal statement that "it is *impossible* to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 1163 (emphasis added). Further, *Leatherman* observed that Rule 9(b) imposes a particularity requirement only in cases alleging fraud or mistake, concluding that under the familiar doctrine of *expressio unius est exclusio alterius*, federal courts were not free to establish "a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims." *Id.*

Although recognizing that the pleading standard invalidated in *Leatherman* was prompted by legitimate policy concerns, the Supreme Court underscored its holding by stating that heightened pleading requirements could only be imposed by "amending the Federal Rules, and not by

judicial interpretation." Id.[3] Thus, it seems clear that this court has no authority to depart from the Federal Rules on the ground that some judges believe that the purposes of qualified immunity might be better served by imposing more stringent pleading requirements. *Leatherman's* emphatic language seems to admit of only one reading: heightened pleading standards other than those set forth in Rule 9(b) are simply *impossible to square* with the Federal Rules of Civil Procedure, and are therefore invalid.

Second, even assuming that some form of heightened pleading requirement may be imposed in this case, the rule announced in *Kimberlin* strayed from binding circuit precedent by holding that our heightened pleading standard requires a plaintiff to plead direct, as opposed to circumstantial, evidence of intent. In *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the case which is the foundation for later decisions purporting to announce a direct evidence requirement, this court held that when the unconstitutional motive of Government officials is an essential element of a claim, a plaintiff's pleading must rest on "non-conclusory allegations of evidence of such intent" in order to proceed to discovery on the claim. *Hobson* did not distinguish between direct and circumstantial evidence -- indeed, the intent of three of the five defendants in that case was established *solely* by circumstantial evidence. *See Kimberlin*, 6 F.3d at 805-06 (Edwards, J., dissenting). The direct evidence requirement grows out of this court's later decisions interpreting *Hobson*, particularly *Siegert v. Gilley*, 895 F.2d 797, 804 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991). *See Kimberlin*, 6 F.3d at 805-808 (Edwards, J., dissenting)

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[3] The Ninth Circuit recognized in a recent decision that *Leatherman* potentially invalidates heightened pleading standards in civil rights cases brought against invididual officials, but declined so to hold because the Supreme Court had withheld judgment on that issue, and the panel felt that it was bound by Ninth Circuit precedent adopting a heightened pleading requirement. *See Branch v. Tunnell*, No. 93-35144, 1994 WL 5496, at *1 (9th Cir. Jan. 12, 1994), *petition for cert. filed*, Feb. 17, 1994.

(discussing genesis of direct evidence rule in misreadings of *Hobson*). At best, then, the law of the circuit is in disarray, and *en banc* review is needed to repair this situation.

In addition, it is noteworthy that, when the Supreme Court upheld *Siegert* on grounds not relied upon by the panel in that case, four Justices made plain that they believed that the direct evidence rule was error. In a separate concurrence, Justice Kennedy wrote that he would "reject . . . the Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence." *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring). Instead, Justice Kennedy concluded that a plaintiff should be required to "put forward specific, nonconclusory factual allegations which establish malice, or face dismissal." *Id.* In another separate opinion authored by Justice Marshall (joined by Justices Blackmun and Stevens), the dissenters in *Siegert* stated that this court "erred in holding" that a plaintiff must proffer "*direct* evidence of the unconstitutional motive." *Id.* at 1800 (Marshall, J., dissenting).

Finally, neither logic nor law offers any support for the direct evidence requirement. The probative value of circumstantial evidence is "intrinsically no different from testimonial evidence," *Holland v. United States*, 348 U.S. 121, 140 (1954), and such evidence can in some cases be "more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). In both civil and criminal contexts, motive is usually established by circumstantial evidence because it is virtually impossible to obtain any other evidence of a defendant's state of mind. *See generally Kimberlin*, 6 F.3d at 809 (Edwards, J., dissenting) (collecting and discussing cases). Moreover, neither this nor any other circuit requires civil rights plaintiffs to prove intent *at trial* via direct evidence -- circumstantial evidence is perfectly adequate proof. Indeed, circumstantial evidence of intent is sufficient proof even in *criminal* prosecutions. Thus, *Kimberlin* countenances

dismissal of claims that would easily be meritorious at trial, simply because a plaintiff cannot, before even beginning discovery, produce direct evidence as to a defendant's motive.

Quite simply, as noted by the Seventh Circuit in a decision rejecting the direct evidence requirement, and by Judge Williams in his concurrence to the panel's opinion in *Kimberlin*, the direct evidence requirement will prove fatal to all attempts to prove motive, except in the rare case in which a defendant confesses. *See id.* at 798 (Williams, J., concurring); *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973, *and cert. denied*, 112 S. Ct. 1242 (1992). As Judge Williams correctly observed, the rule adopted by the *Kimberlin* panel requires dismissal of a claim brought by a plaintiff who adduces overwhelming circumstantial evidence of guilt, but would permit another plaintiff to proceed based upon a single perjured contention that he overhead a defendant's confession. *Kimberlin*, 6 F.3d at 798 (Williams, J., concurring). Such a result is, as the *Kimberlin* concurrence forthrightly admits, "completely arbitrary and unrelated to the strength of the plaintiff's case." *Id.* It is no wonder that all of the other circuits that have considered a direct evidence requirement have explicitly rejected it. *See id.; Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991) (rejecting direct evidence requirement "[b]ecause evidence of intent is largely within the control of the defendant and often can be obtained only through discovery"); *Elliott*, 937 F.2d at 345 (noting that "there is no principled difference between direct and circumstantial evidence"); *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989) (rejecting direct evidence requirement because it would require plaintiff "to come forth with more evidence than he would have to produce to prevail on the merits").

By refusing to rehear this case *en banc*, a plurality of this court has imposed a rule which is irrational and arbitrary, and which finds no support in the Federal Rules of Civil Procedure. There has been no suggestion from the

judges voting to deny rehearing that Supreme Court precedent *compels* this circuit to adopt a direct evidence rule. The plurality instead makes a self-styled "trade-off" between competing ends. Concurrent to Denial of Suggestion for Rehearing *En Banc* (Williams, J.). This "trade-off," however, effectively closes the courthouse doors to any plaintiff to whom it applies, denying relief to a whole class of claims, apparently only on the basis of the plurality's conviction that the Supreme Court has gone too far in permitting them.

The court's action in denying *en banc* review rests on an extraordinary use of judicial authority, one that I thought was not tolerated by those who purport to believe in "judicial restraint." *See, e.g.,* Laurence H. Silberman, Chevron -- *The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 821 (1990) (noting that the author counts himself among those who have "decried the extraordinary expansion of judicial power in the latter half of this century;" and observing that the one concept that most distinguishes those who advocate "judicial restraint" is "avoidancer of judicial policy making"). The plurality's decision has its roots in policy choices, not in law. This is not surprising, however. For, as one of my colleagues has observed, "When judges think of themselves as bearing responsibility for the results dictated by a neutral application of the law, . . . they tend to exceed the appropriate bounds of judicial restraint." *United States v. Pryce*, 938 F.2d 1343, 1355 (D.C. Cir. 1991) (Silberman, J., dissenting in part).

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its progeny are the law of the land and control the actions of this court. I am amazed that a plurality of the members of this circuit have chosen to adopt an admittedly arbitrary and illogical rule that effectively renders impossible all *Bivens*-type civil rights actions that turn on the intent of a Government official. This court is bound by Supreme Court precedent, by fidelity to our own precedents, and by simple logic, both to rehear and

revise *Kimberlin v. Quinlan*. It is my hope that the Supreme Court will see fit to reverse the error that this decision introduces into the law of this circuit.

I dissent.

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule 9. Pleading Special Matters

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a

summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.